Supreme Court, U. S.
FILED
JUL 21 1980
MICHAEL RODAK, JR., CLERK

80-87

No. _____

In the Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA

v.

3,218.9 ACRES IN WARREN COUNTY PENNSYLVANIA (ROSS HEIRS, DAVID OIL COMPANY, AND L. M. LILLY ESTATE)
Petitioners

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR WRIT OF CERTIORARI

JOSEPH J. MALIZIA,
25 East Fourth Street,
P. O. Box 111,
Emporium, Pennsylvania 15834
814-486-1181
Counsel for Petitioners

Murrelle Printing Co., Box 100, Sayre, Pa. 18840—(717) 882-0401

TABLE OF CONTENTS

	Page
Question Presented	1
Parties to the Proceedings	1
Opinions Below	2
Jurisdiction	2
Constitutional Provision Involved	2
Statement of the Case	3
Reasons for Granting the Writ	17
Conclusion	30
APPENDIX:	
A. Opinion of U.S. Court of Appeals for the Third Circuit	1a
B. Opinion of U.S. District Court for the Western District of Pennsylvania	11a
Order Denying Motion for New Trial	21a
Pretrial Order	21a
Government's Exhibit A	24a
Landowners' Exhibit B	25a
Order on Motions and for Pretrial	26a
C. Judgment of Circuit Court	30a
D. Declaration of Taking Conditions, Rules, and Regulations	34a
Schedule B	38a
Schedule C	39a
E. District Court Pre-Trial Hearing Excerpts	44a
F. District Court Evidentiary Hearing, Opening Statement, Statements and Relevant Excerpts, Stipulations, and Statements re Submission of Conditions, Rules and Regulations to Jury	46a
G. District Court Pre-Trial Conference Excerpts	67a
H. Jury Trial Excerpts	70a

TABLE OF CITATIONS

CASES:

A. W. Duckett and Co., Inc. v. United States, 266 U.S. 149 (1924) 24

Bumpus v. United States, 325 F.2d (CA 10, KAN, 1963) 22

Danforth v. United States, 308 U.S. 271 (1939) . 24

Georgia Pacific Corp. v. United States, 568 F. 2d 1316 (Ct. Cl. 1978) 22, 23

Kendred v. Union Pacific R.R. Co., 225 U.S. 582 (1912) 24

Olson v. United States, 262 U.S. 246 (1934) 23

Penn. Cent. Transp. Co. v. New York City, 438 U.S. 104 (1978) 25

Swanson v. United States, 156 F.2d 442, cert. den. 329 U.S. 800 (1946) 24

United States v. Central Eureka Mining Co., 357 U.S. 155 (1958) 24, 25

United States v. General Motors, 323 U.S. 373 (1945) 23

United States v. Grizzard, 219 U.S. 18 (1911) .. 21

United States v. Hayes, 172 F.2d 677 (CA 9, OR. 1949) 28

United States v. Miller, 317 U.S. 369, reh. den. 318 U.S. 798 (1943) 21

United States v. Virginia Electric Power Co., 365 U.S. 624 (1961) 18

United States v. Welch, 217 U.S. 333 (1910) ... 18

United States v. 64.88 Acres in Allegheny County, Pa., 244 F.2d 534 (3rd Cir 1957) 18

United States v. 10.0 Acres, 533 F.2d 1092 (CA 9, Cal., 1976) 18

United States v. 3,317.39 Acres of Land, More or Less, in Jefferson Cty., AR., 443 F.2d 104 (8th Cir., 1971) 18

United States v. 20,119 Acres of Land, 478 F.2d 1042 (CA 9, WASH. 1973) 18

United States v. 21.54 Acres in Marshal County, W.Va., 491 F.2d 301 (4th Cir. 1973) 18, 23

TREATISES:

7 ALR 2d 366 (1949) 29, 30

12 P.L.E. 59 (1959) 22

QUESTION PRESENTED

If the Secretary of Agriculture intentionally employs uncertain language in a declaration of taking, purporting to take only a surface estate and excepts the subsurface estate, and there exists common proprietary rights in the surface owned by both estates, and also simultaneously imposes conditions, rules and regulations on said surface, affecting the value of the subsurface, a "taking" occurs and the question of just compensation is properly before the district court.

PARTIES TO THE PROCEEDINGS

The Ross Heirs, owners of 479.30 acres of surface, owners of 8/8ths of oil and gas rights on 5.42 acres, and owners of 1/8th of oil and gas rights on 419.11 acres.

David Oil Company, owner of 7/8ths of oil and gas rights on 419.11 acres.

The Estate of L. M. Lilly, owner of 8/8ths of oil and gas rights on 54.77 acres.

United States of America, Secretary of Agriculture.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is unreported and is printed in Appendix A hereto, infra page 1a.

The memorandum and order on motion for new trial in the United States District Court for the Western District of Pennsylvania is printed in Appendix B, page 11a.

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit, Appendix C, page 30a, was entered on April 23, 1980. This petition for certiorari was filed less than ninety days from the date aforesaid. The jurisdiction of this Court is invoked under 28 USCS 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Constitution of the United States, Amendment V quotes "... nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

Original jurisdiction vests in the District Court when real estate is condemned for the use of the United States. (28 USCS 1358). The United States took the land pursuant to 40 USC 258(a).

On December 5, 1974, the United States filed a declaration of taking condemning 479.30 acres of land, known as tract 961, in the Allegheny National Forest, said lands being necessary to promote and protect the navigation of streams and the production of timber thereon and for the development and management of adequate outdoor recreational resources in connection with the Allegheny Reservoir Project and for other authorized purposes.

Located within the geographical description of the 479.30 acres condemned were the following ownerships, being all the Petitioners herein:

(a) Ross Heirs, owners of 479.30 acres of surface, owners of 8/8ths of oil and gas rights on 5.42 acres and owners of 1/8th of oil and gas rights on 419.11 acres.

(b) David Oil Company, owner of 7/8ths of oil and gas rights on 419.11 acres.

(c) The Estate of L. M. Lilly, owner of 8/8ths of oil and gas rights on 54.77 acres.

The declaration of taking is as follows:

"To promote and protect the navigation of streams, and the production of timber thereon, and for the development and management of adequate outdoor resource purposes in connection with the Allegheny Reservoir Project, and for all other authorized purposes.

The Estates to be taken for said public use are as follows:

Tract 961

The fee simple title, subject however, to existing easements for public roads and highways, public utilities, railroads, and pipelines; the reservation in the owners thereof, their successors or assigns of all coal, oil, gas, and other minerals not outstanding of record in third parties, together with the right to enter upon the land and prospect for, mine, and remove the same in accordance with the rules and regulations of the Secretary of Agriculture dated April 30, 1963, a copy of which is attached hereto, as schedule 'C'; and the exception of all coal, oil, gas and minerals outstanding of record in third parties."

The "Rules and Regulations", attached as Schedule "C", reserved to the owners, are twelve in number which in fact are "Conditions, Rules and Regulations", of which only four are set forth herein (Appendix, 39a).

> "Conditions, Rules and Regulations To Govern Exercise of Mineral Rights Reserved in Conveyances to the United States
>
> (a) ...
>
> (1) Whoever undertakes to exercise the reserved rights shall give prior written notice to the Forest Service and shall submit satisfactory evidence of authority to exercise such rights. Only so much of the surface of the lands shall be occupied, used, or disturbed as is necessary in bona fide prospecting for, drilling, mining (including the milling or concentration of ores), and removal of the reserved minerals, oil, gas, or other inorganic substances.

(2)(i) None of the land in which minerals are reserved shall be so used, occupied, or disturbed as to preclude their full use for authorized programs of the Forest Service until the record owner of the reserved rights, or the successors, assigns, or lessees thereof, shall have applied for and received a permit authorizing such use, occupance, or disturbance of those specifically described parts of the lands as may reasonably be necessary to exercise of the reserved rights.

...

The Evidence:

Within the estates taken by the declaration of taking, consisting of 479.30 acres and designated as Tract 961, the pre-trial hearings and evidence produced at trial as it relates to the declaration of taking were as follows:

"The Fee Simple Title, ..."

The Ross Heirs, one of the Petitioners herein, owned all of the surface, consisting of 479.30 acres; they also owned, in addition to the surface, 8/8ths of all oil and gas subsurface rights on 5.42 acres and 1/8th of all oil and gas rights for subsurface under 419.11 acres.

Evidence at pre-trial and at trial established and depicted many lease roads and roadways which were owned by the Ross Heirs extending over the entire surface. The Ross Heirs, as owners, had exclusive rights over these roadways as well as all the surface excepting rights in said surface and roads and roadways by instruments of record in David Oil Company and L. M. Lilly Estate. The instruments of the Ross Heirs on title are of record.

The David Oil Co. owns a 7/8th interest in the subsurface under 419.11 acres of said tract, upon

which they have an operating oil property consisting of many oil wells, attached oil and gas lines, tanks, powers, gathering lines, roadways, and rights in the surface of Tract 961 for further roadways, rights-of-ways, and a right to cut timber and explore for oil and gas with the only limitation, as follows:

> "It is further agreed that said lessees shall not cut any of the growing timber on said premises, except to clear ground for rigs, powers, tanks and necessary buildings and right-of-way to the same from the present roads on said premises, and shall not in any event cut any merchantable timber without first giving lessors five days notice in writing of the locating of any particular rig, powers, tanks or buildings and the right of way leading thereto but with the understanding that said lessees shall have the right to brush out any existing rights of way or rod lines without giving notice heretofore provided for."

Said document of title further provides:

> "To have and to hold the said premises for said purposes only unto the said lessees, their heirs and assigns, so long as only oil and gas, or either of them, be produced therefrom in paying quantities."

Testimony elicited as to five days notice with regards merchantable timber, established at pre-trial hearings, was only for the purpose of giving the Ross Heirs wood for their own use. The Ross Heirs never exercised said right. At pre-trial hearings it was established that many roadways were built on the surface by David Oil Company to well sites and that approximately six wells and well locations had been established and wells drilled. Further, that many proposed roads and site locations were established on the premises for further drilling of wells and establishment of roads but drilling operations ceased many years

previous to the declaration of taking because of statements by agents of the U.S. Forestry that the entire area was going to be eventually condemned. In addition, in order to conduct a complete drilling operation, complete access to the entire surface was necessary and at trial it was established a complete operation over the total surface would require sufficient wells drilled thereon, with necessary roads and roadways, so that each five acres of the total area could be drained by these wells. Testimony at both pre-trial and trial evidenced modern methods and need for the entire surface and how wells are operated with connecting rod lines running over the surface, pumping the wells from structures known as "power houses" which are permanently built upon the premises.

The documents of title of the David Oil Company are of record.

The L. M. Lilly Estate is the owner of 8/8ths of 54.77 acres of subsurface rights in the oil and gas with the Ross Heirs owning the surface at time of taking. The L. M. Lilly Estate owns approximately 14 oil wells with connecting gas and oil lines between wells and tanks and have considerable roadways, which they have constructed on the surface and the right-of-way for further roadways for further exploration for oil and gas. They have the right to cut timber.

Their deed of record provides in part, as follows:

> "Also a right-of-way over and across said premises for the purpose of drilling and operating for and producing petroleum, oil and gas from said premises in the usual and customary manner."

Testimony elicited at pre-trial hearings established that the "usual and customary manner" vested complete discretion in the subsurface owner as to location

for drilling of oil wells, construction of roadways, and rights of access over the surface. It was further established at trial that said roadways were built by the L. M. Lilly Estate and it was shown both Ross Heirs, owners of the surface, as well, as L. M. Lilly Estate would have rights of access, in, over and across said roadways which were built by the L. M. Lilly Estate. The testimony further established that this parcel is a remainder parcel from a previous condemnation of the oil rights in fee simple absolute of an adjoining parcel by the United States, for which no compensation in that action had ever been paid to the L. M. Lilly Estate for the 54.77 acres.

The documents of title of the L. M. Lilly Estate are of record and all documents of record of all parties were demanded and produced in the District Court for examination with testimony thereon at appropriate pre-trial hearings before the matter was submitted to the jury for trial.

"... *Subject However, ...; the Reservation in the Owners Thereof, Their Successors or Assigns of All Coal, Oil, Gas, and Other Minerals, Not Outstanding of Record in Third Parties, ...*"

The L. M. Lilly Estate and David Oil Company, at pre-trial hearings, established that the owner of the surface of said tract is the Ross Heirs and they have rights of access in and over said surface which they have exercised in the past by drilling wells and constructing roads and further they have the right to establish and further explore for oil and gas by drilling further wells, erecting oil and gas lines and that they did own the oil and gas subsurface.

No evidence was produced at the pre-trial hearings or at any trial of any other surface interest that are "not outstanding of record in third parties."

The Trial Court, at the conclusion of pre-trial evidentiary hearings, requested clarification of the Secretary of Agriculture concerning the use of the language "third parties" and was refused.

"... *Together With the Right To Enter Upon the Land and Prospect for, Mine, and Remove the Same in Accordance With the Rules and Regulations of the Secretary of Agriculture, Dated April 30, 1963* ..."

Testimony was presented at the pre-trial hearings, as well as at trial on use of surface by the subsurface owners, Ross Heirs, David Oil and L. M. Lilly Estate, necessary for an oil operation. It was established in both cases, L. M. Lilly and David Oil, that a going oil operation was presently in progress on the property with established oil wells, tank locations, powers and so forth. Testimony as to usual and customary manner for continuing an oil operation was established at the pre-trial hearing.

The neighborhood in which Tract 961 was located was established at pre-trial hearings and on the trial of the case to be adjoining a dam which had been built by the Corps of Engineers and is known as the Kinzua Dam and is additionally surrounded by other lands owned by the Government in the Allegheny National Forest. That the surrounding neighborhood is a recreational area permitting boating on the waters behind the dam and is open to the public for recreational purposes consisting of hiking, camping, snowmobiling, with many connecting public highways and access roads for use by the public. The entire surface of Tract 961 is covered with extensive marketable timber.

The Trial Court at pre-trial hearings heard evidence concerning the effect of the rules and regulations upon the oil and gas operations. The Trial Court

requested clarification from the Secretary of Agriculture concerning the rules and regulations and the Secretary refused.

"... *The Copy of Which Is Attached Hereto as Exhibit 'C'; ...*"

Evidence produced at pre-trial and trial established that marketability of title to subsurface was affected, as the effect of the rules and regulation was to restrict the marketability of the subsurface interest. That the language of the rules and regulations, referring to same as "conditions" and "none of the lands in which minerals are reserved shall be so used, occupied or disturbed, as precludes their full use for authorized programs of the Forest Service..." Considering that the land in question borders upon the recreational dam, drilling thereon would be severely restricted.

Drilling operations could not be carried on without full and free use of the surface with rights of control and dominion of rights-of-way for ingress and egress were essential to a drilling operation. Evidence was further established that the rules and regulations and the language of the declaration of taking destroys the title to the property to the subsurface owners as a marketable title.

The government offered no evidence on the rules and regulations but attempted to offer on the record, by the U.S. Attorney, that the government would not enforce the rules and regulations as to the Ross Heirs (excepting 5.42 acres), David Oil and L. M. Lilly.

"... *And the Exception of All Coal, Oil, Gas and Minerals Outstanding of Record in Third Parties.*"

The government's only evidence would be that, since L. M. Lilly and David Oil had documents of title of record, duly recorded, they are third parties.

The District Court requested clarification of the above language and the Secretary of Agriculture refused.

District Court Rulings:

The District Court, after proper evidentiary hearings, determined from the language of the declaration of taking that the words "fee simple title", "the owners thereof" included the Ross Heirs, David Oil and L. M. Lilly Estate and requested clarification from the Secretary of Agriculture of the language of the declaration of taking. "The Government has now informed the Court that there will be no clarification of the language of the Declaration of Taking of Tract 961" (Appendix 28a).

The District Court further concluded that the Ross Heirs, David Oil, and L. M. Lilly Estate all had proprietary possessionary rights in the surface of Tract 961.

> "But in connection with leases and conveyances in which subsurface owners acquire oil and gas rights is indicated in Appendix A, such a taking would destroy;
>
> 'the right of way over and across said premises for the prupose of drilling and operating for and producing petroleum, oil and gas from said premises in the usual and customary manner.'
>
> A right of way is certainly a real property, which can be condemned or wiped out. A surface-only taking in this case would require just compensation of the oil and gas operators for destruction of such a right of way." (Appendix 19a)

The District Court further held hearings concerning the effect of the rules and regulations of the Secretary of Agriculture when he stated:

> "At these hearings, testimony was taken as to the effect of the rules and regulations of the Secretary of Agriculture imposed on the oil and gas subsurface in the Declaration of Taking in which certain reservations of oil and gas are mentioned."
>
> "The reason for the evidentiary hearing on November 15, 1977, was to make a determination, if appropriate, that no subsurface rights were affected by the taking. It seems self-evident to this Court that the very motion praying for a determination by the Court of the estate taken indicates the uncertainty of the language." (Appendix 14a-15a)

The District Court, concluding there was a compensable taking by the language of the declaration of taking and mutual proprietary rights in the surface by the Ross Heirs, David Oil and L. M. Lilly submitted to the jury the entire facts to determine just compensation, if any, measuring just compensation on the value of the entire Tract 961, immediately before the condemnation and as unaffected thereby and the value of the remaining portion of the lands after the condemnation and as affected thereby, on a stipulated special verdict which determined not only the just compensation due to the taking of the whole tract but allocated the just compensation among the claimants (Appendix 22a-23a).

The Trial Court said:

> "It is clearly evident to this Court that, considering the facts that counsel stipulated and agreed to the Special Verdict form and bearing in mind that counsel for the government submitted

four proposed instructions to the jury relating to the issue now under discussion, that the jury followed the instructions, understood the issue and returned a verdict in a dollar amount in response to their proposed instructions, and in accordance with the stipulated Special Verdict form." (Appendix 20a)

The Special Verdict was taken as follows:

1. What do you award as just compensation for the taking of all interests in tract 961 consisting of 479.30 acres? $807,167.00

2. Out of the above award, what amount do you allot or apportion to each of the following interests:

a. The Ross heirs, et al., ownership of the surface of 479.30 acres, excluding all oil and gas rights....$315,920

b. The Ross Heirs, et al. (8/8ths) ownership of oil and gas rights on 5.42 acres of Tract 961....$5,435

c. The David Oil Company (7/8ths) and Ross Heirs, et al. (1/8th) ownership of oil and gas on 419.11 acres of Tract 961....$420,000

d. The Estate of L. M. Lilly's ownership (8/8ths) of oil and gas rights on 54.77 acres of Tract 961....$65,812

The government appealed the special verdict (c) and (d) to the Circuit Court.

The District Court did in fact make pre-trial determinations that:

(A) A part of the whole was in fact taken, namely the surface;

(B) that the language of the declaration was ambiguous as to part taken and part excepted and reserved;

(C) that each party claimant had a portion of their surface estate taken, and a portion excepted and reserved;

(D) that the portion excepted and reserved was a remainder interest to all parties;

(E) that imposition of the rules and regulations on the remainder excepted and the effect on market value was a "taking" and damages thereby a factual issue for the jury;

(F) that case should go to the jury for damages as to the part of the whole actually taken.

Circuit Court Rulings:

The Circuit Court reversed the District Court, alleging as error the submission of the issue to the jury on just compensation as the plain language of the declaration excluded the subsurface and, therefore, the court was, in effect, usurping the legislative function by enlarging the estate taken.

On the question of the language of the declaration and proprietary interest included therein, they conclude:

> "The language excepting the minerals is clear that third party mineral rights are not intended to be affected by the declaration. In view of this explicit limitation of the nature of the estate to be taken, the district court was without power to enlarge their terms of the taking." (Appendix 7a)

On the question of the imposition of the conditions, rules and regulations and whether they constitute a taking, they stated as follows:

> "Second, the possibility that in the future the Secretary's Rules may inhibit the defendants in the removal of the minerals does not provide a current basis for damages. The district court apparently believed that there was a taking of the subsurface estate because the Secretary's regulations of the surface use would greatly diminish the value of the drilling rights. We have held, however, that a possible future taking of property does not give rise to a present cause of action for damages. (Appendix 7a)

And further:

> "Thus, the cause of action for potential consequential damages to the subsurface estate accrues, not at the time of the taking of the surface, but if and when the damage occurs to the subsurface estate." (Appendix 8a-9a)

The Circuit Court completely ignored whether or not the imposition of the conditions upon the subsurface amounted to a taking now.

On the question of bad faith of the Secretary, the ruling of the Circuit Court was that:

> "The 'bad faith' allegedly is evidenced because the Secretary declined to clarify the language in the declaration of taking. However, the 'bad faith' discussed in *64.88 Acres in Allegheny County*, 244 F.2d 534 (3d Cir. 1957), does not refer to the failure to clarify the declaration. Rather, we believe 'bad faith' in this context is an attempt to secure a greater property interest than that specified in the declaration of taking, without just compensation. In this case, the Government has unequivocally expressed its inten-

> tion not to take the oil, gas, and other mineral interests and it has no reason for seeking them." (Appendix 9a)

This belies the evidentiary matter obtained at pre-trial hearing by the District Court concerning previous condemnation of subsurface rights in fees, a portion of L. M. Lilly property which was not compensated for in previous condemnations in fee and was included in this parcel, use of the surface and so forth (Appendix 53a-54a).

The Circuit Court failed to Accept any of the District Court's determinations. The fundamental concept of "fee simple title" owners, easements, "reservation" and "exception" need not be set forth herein as to either local law or Federal Law as they have a universal meaning under American Law. The evidentiary determination made by the District Court that proprietary interests, owned by each of the parties involved, had been appropriated, was completely disregarded by the Circuit Court.

All subsurface and surface owners had free unfettered use of the surface which was a part of their total ownership taken away from them by the declaration of taking and substituted therefor was a conditional use thereon. Even though the part not taken happens to be the part excepted and reserved does not exclude jurisdiction to the District Court. It is a clear case of the difference in value before the taking, unfettered by the conditional use of the surface, and the value of the interest after, as affected by the conditional use thereof. The taking occurred as the result of the condemnation and it is properly before the Court.

Imposition of the conditions by the taking is the issue here and not future restrictions on the use, which admittedly would be for the Court of Claims. The issue now today is depreciation in the fair market

value of the total property and, if it is not captured now, it is forever lost to the Petitioners.

REASONS FOR GRANTING THE WRIT

This writ should be granted for the following reasons:

REASON NO. 1

"Where a common proprietary interest to a surface and a subsurface owner is acquired by the language of the declaration of taking, which at one place 'takes' said proprietary interest by condemnation and at another place in the same declaration 'excepts' that common proprietary interest, a just compensation issue arises for the Courts, which is not a judicial interference with the legislative process."

Julia Ross, the surface and the subsurface owner, David Oil, the subsurface owner, and L. M. Lilly, the subsurface owner, all had ownership in the surface of Tract 961. This ownership consisted of the roadways, rights of ingress, egress, access generally over and above and through said lands. All parties could use these roadways, although built by the subsurface owners, without interference from the other parties. Condemnation clearly acquired the fee simple title to the fee and extinguished these proprietary interests. The declaration of taking, at the same time, purports to except all coal, oil, gas, amd minerals outstanding of record in third parties. This language does not except the easements and roadways existing on the surface.

There appear to be no decisions from other circuit or district courts confronted with the same language in

the declaration of taking as evidenced here. The Third Circuit's conclusion in this case relies upon *U.S. vs. 3,317.39 Acres of Land, More or Less, in Jefferson County, Arkansas*, 443 F.2d 104, 106 (8th Circuit, 1971); *U.S. vs. 64.88 Acres of Land in Allegheny County, Pa.*, 244 F.2d 536 (3rd Circuit 1957); and *U.S. vs. 21.54 Acres in Marshal County, W. Va.*, 491 F.2d 301, 304 (4th Circuit 1973), for the proposition that the government's determination of the nature and extent of the estate to be taken is not judicially reviewable. This begs the question. The question before the Court is the right of interpretation to determine if proprietary interests have been acquired as a result of the nature and extent of the estate taken.

The surface estate taken, by artful language, extinguished real property vested interests owned by the subsurface owners in that part acquired. This consisted of roadways actually built and in being, along with the right to build and maintain more of said roadways in the future. The ownership and rights therein vested in both surface and subsurface owners. They are not now, not have they ever been, third parties as to this prospective property right.

An owner of an enforceable easement is entitled to compensation as a property owner. *U.S. vs. Welch*, 217 U.S. 333 (1910); *U.S. vs. Virginia Electric Power Co.*, 365 U.S. 624 (1961). This has been held so, even when the government assured a timber company whose private road had been acquired for public use that they could continue their ordinary use of the roads. *U.S. vs. 20119 Acres of Land*, 478 F.2d 1042 (CA 9, Wash. 1973). The same result occurred when a landowner possessed an exclusive easement along with two other persons to a private road over the land of others when the government condemned said road and opened it to the public for use as an access road to a National Forest. *U.S. vs. 10.0 Acres*, 533 F.2d 1092 (CA 9, Cal., 1976).

A clear ambiguity exists as to the nature of the estate taken and the District Court has the power to interpret the language in the first instance and properly determine proprietary interests. If proprietary interests are determined to be partially "taken" and partially "excepted", the District Court has jurisdiction to determine just compensation and is not thereby enlarging the estate taken.

The "fee simple title" includes all owners, both surface and subsurface. All "owners" have proprietary interest in the surface; Ross Heirs, because they own the surface; David Oil Company and the L. M. Lilly Estate because they built roadways upon the surface for access to and from their operations all over the surface, plus, in addition, had wells, jacks, connecting gas and oil lines and other structures on the surface as part of the realty. Their rights of access were in common with each other. The rights-of-way are private to them.

The "reservation in the owners thereof" refers to either: (1) "fee simple title"; or (2) "oil and gas not outstanding in third parties."

If the "owners thereof" refers to the "fee simple title" it clearly includes Ross Heirs, the L. M. Lilly Estate and the David Oil Company. If, on the other hand, "owners thereof" refers to "oil and gas not outstanding of record in third parties", a dubious situation arises. If the mineral estate is severed and is to be considered a separate entity or estate owned by Ross Heirs, David Oil Company or the L. M. Lilly Estate who have recorded titles, how can they be "third parties?" Neither party is a "third party" either to the "fee simple title" or a separate mineral estate which has vested rights in the surface. They have common ownership in either event and a taking of the surface creates a severance of common ownership. A part of a whole has been taken and, in addition, a set of

"conditions" have been imposed on the remainder of each party. If Ross's 1/8th interest runs with the surface or is vested in the David Oil Company's title as a royalty, the declaration would, in either event, divest them of property rights because with the 1/8th interest running with the land they control the total ownership of the surface and, in the latter event, their title being in David Oil Company, they had surface rights which were extinguished; hence in neither event are Ross, David Oil Company and L. M. Lilly Estate excluded from this declaration of taking.

Looking entirely at the "exception", and assuming the parties are "third parties" and "oil and gas are excepted", still brings into play a severance because their documents of title have rights-of-way on the surface and are now extinguished as not reserved, and, furthermore, their use of the surface is "conditioned" upon performance of "conditions, rules and regulations" rendering their estates unmarketable, which affects market value.

The Court's power of interpretation should not be confused with extending the estate taken.

REASON NO. 2

That filing of a declaration of taking, wherein a part of a total tract is "taken" and simultaneously conditions are imposed on the part not taken, where there are common ownerships in both parts, is a matter for the District Court in the first instance to determine whether proprietary interests are taken and not the Court of Claims under the Tucker Act.

The "interest to be acquired" was the estate taken, namely the surface along with the vested rights of subsurface owners in said surface estate whose oil and gas rights were excepted. This was a factual

determination for the court to ascertain in the first instance outside of the presence of the jury. Vested proprietary rights in common owners were determined, the Third Circuit ignored this determination because of the words "exception of all coal, oil, gas, and minerals outstanding of record in third parties." They were apparently quick to conclude that because there are three estates in the State of Pennsylvania, a subsurface estate must be a "third party". Confusion arises among the Circuit Courts in construing declarations of taking by the government of a part of a tract when the part remaining to the same owners is not described as taken by the declaration and, therefore, the tendency is to create two lawsuits, one in the District Court on the issue of just compensation in the condemnation action, and the other in the Court of Claims. There should be no confusion on the facts here presented; the description of the declaration embraces all ownerships here involved, there is no just compensation awarded for any property not encompassed in the taking description. A severance exists. In such case, the landowners are entitled to be paid for any injury to their remaining lands not taken. This right to recovery is not based upon the theory that damage to the remainder constitutes the taking of it, nor is there any requirement that the damage be special and peculiar, or such as would be actionable at common law; it is enough that it is a consequence of the taking. *U.S. vs. Miller*, 317 U.S. 369, reh. den. 318 U.S. 798 (1943).

When part of a tract is taken, the entire tract is considered as a whole and the effect of the condemnation and the projected use evaluated so that determination can be made of what he had prior to the proceedings and what he had thereafter. *United States vs. Grizzard*, 219 U.S. 180 (1911).

Economic impact of the regulation is a factor, particularly the extent to which the regulation has interferred with distinct investment-backed expectations.

In this situation we have clear physical invasion and severe injury to the salability of the subsurface interest, which is clearly an economic impact; only after the Trial Court first determined these matters were the issues then submitted to the jury for determination of actual just compensation. The case here presented is even stronger because the actual rules and regulations attached to the declaration read "*Conditions ... to govern exercise of mineral rights.*"

In Pennsylvania Law Encyclopedia, Volume 12, page 59, it states as follows:

> "A condition is a qualification upon a conveyance upon the happening of which an estate may commence, be enlarged, or be defeated."

In contemplation of just compensation being measured by fair market value between a willing buyer and willing seller, we now have the United States as an unwanted bedfellow by the subsurface owners. The willing buyer would be and is classified by the condition as a "permittee."

Where less than a fee simple title is taken, the interest in the estate taken must be sufficiently described so that landowners will know what is reserved to them. *Bumpus vs. United States*, 325 F.2d 267 (CA 10 Kan. 1963).

"The District Court is authorized to make authoritative determination first, whether or not property was compensably taken by the United States at all, and if so, when, ..." *Georgia Pacific Corp. vs. United States*, 568 F.2d 1316 (Ct. Cl., 1978).

Although both Court of Claims and District Court can take account of and decide actual date of taking by government of claimant's land, only District

Court, when government has filed a condemnation suit, has authority to determine all aspects of claimant's right to compensation, and, therefore, District Court is the preferred forum in which to center the whole litigation. Georgia-Pacific Corp. vs. United States, 568 F.2d 1316 (Ct. Cl. 1978).

The Circuit Court concluded a taking by the conditions is for the Court of Claims under the Tucker Act. This creates unnecessary litigation and, as was stated in the *United States vs. 21.54 Acres of Land in Marshall County, W. Va.*, 491 F.2d 301 (4th Cir. 1973), "... the necessity of having two trials to resolve a single issue can hardly be said to further the interest of judicial economy in a time of overburdened court dockets."

REASON NO. 3

"Where part of the Tract is taken and a part not taken is excepted and reserved but conditions, rules and regulations are imposed on the part not taken simultaneously with the declaration of taking, it is for the District Court to determine if a compensable event occurred, affecting fair market value."

The guiding principle of just compensation is reimbursement to the owner of the property interest taken. He "is entitled to be put in as good a position pecuniarily as if his property had not been taken and must be made whole, but he is not entitled to more." *Olson vs. U.S.*, 262 U.S. 246 (1934).

The property is "... the group of rights inhering in the citizens' relations to the physical thing, as the right to possess, use and dispose of it ... the constitutional provision is addressed to every sort of interest the citizen may possess." *United States vs. General Motors Corp.*, 323 U.S. 373 (1945).

In its primary meaning the term "taken" would seem to signify something more than destruction for it might well be claimed that one does not take what he destroys, but the construction of the phrase has not been so narrow. The Courts have held that the deprivation of the former owner, rather than the accretion of a right or interest to the sovereign constitutes the taking. Governmental action, short of acquisition of title or occupancy, has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking. The term "owner" has been held to include any person having a compensable interest in the property which is the subject of the acquisition. *Swanson vs. The United States*, 156 F.2d 442, cert. den. 329 U.S. 800 (1946). It is the owner at the "time of the taking" who is entitled to the compensation. *Kendred vs. Union Pacific R.R. Co.*, 225 U.S. 582 (1912); *Danforth vs. United States*, 308 U.S. 271 (1939). It is a proceeding in rem. It is not a taking of rights of persons in the ordinary sense, but an appropriation of the very land or property itself. When the property is taken, all previous estates or estates in land are extinguished. *A. W. Duckett & Co., Inc. vs. United States*, 266 U.S. 149 (1924).

The District Court submitted the matter to the jury on just compensation only after pre-trial hearings and evidentiary hearings as to the interests of the claimants involved and the effect of the conditions, rules and regulations on the subsurface owners.

The Circuit Court said that was for the Court of Claims or, in other words, the landowners have to have two lawsuits instead of one.

Whether regulation or "a particular governmental restriction" amounted to a taking is a question properly turning upon the particular circumstances. *United States vs. Central Eureka Mining Co.*, 357 U.S. 155

(1958). Taking can more readily be found when the interference with property can be characterized as a physical invasion by government. *Penn. Cent. Transp. Co. vs. New York City,* 438 U.S. 104 (1978).

The imposition of the conditions on the remainder excepted by the taking is the question under consideration and completely ignored by the Circuit Court. Evidentiary pre-trial hearings and a jury found these conditions on the title did, in fact, substantially affect the fair market value thereof. The particular circumstances here amount to a physical invasion by government on the lands excepted. This should be a compensable event.

REASON NO. 4

Where the Secretary of Agriculture, in acquiring land, words a declaration of taking employing uncertain language as to estate that is taken and remainder not taken, which language interpreted in its entirety evidences an attempt to take and control the whole, the District Court can submit and should submit the entire tract for a jury determination of damages, if any, to the whole.

The landowners allege "bad faith" for purposes of judicial review at the District Court and Circuit Court levels against the Secretary of Agriculture. The Third Circuit agreed "bad faith" is an attempt to take land beyond the terms of the declaration. This is an issue not heretofore determined by the Supreme Court.

The landowners are victims of previous condemnations on the same overall project, namely the Kinzua Dam. The first condemnations that took portions of their surface and subsurface lands was for the initial flood control project. Later, further condemnations were instituted by the Secretary of Agriculture around the periphery of the dam as part of the Allegheny National Forest.

In the case of the L. M. Lilly Estate, a previous condemnation of an adjoining Tract 963 by the U.S. Forestry, a large portion of the L. M. Lilly Estate lands were condemned in fee. (This Tract was known as Tract 963.) A remaining portion of L. M. Lilly lands, not included in Tract 963 as a remainder, is included in Tract 961 here in question. The reason why the 54.77 acres was not included in the previous condemnation of Tract 963, and adjoining tract, was that, since it was not geographically included in the description of 963, therefore it could not be included in the trial of that case for just compensation. At the time of the trial of 963, the U.S. Forestry had not actually condemned Tract 961 herein but had, at that time, issued maps and made offers to L. M. Lilly indicating authority to take 961 in fee; the offers in settlement were never accepted. The jury returned a verdict on Tract 963 in a substantial amount in excess of $600,000.00. The Secretary of Agriculture then condemned Tract 961 with the declaration here in question. This left the L. M. Lilly parcel of 54.77 acres isolated with wells located thereon, which were operated by powers condemned on Tract 963. L. M. Lilly Estate did not get compensation in the previous trial for the 54.77 acres and the declaration purports to exclude them from compensation in this condemnation. The Secretary of Agriculture was given notice of the facts and they were made part of the overall record established at pre-trial evidentiary hearing before the District Court.

The David Oil Company, on the other hand, in a previous condemnation of other lands of which Tract 961 is a remaining part, secured a verdict for the taking of certain subsurface lands. The verdict was returned on the basis of the whole interest in the mineral estate. After the verdict was returned, and for the first time, the United States filed and claimed 50% of the verdict because they owned the surface of the

property by virtue of a deed from the Ross Heirs, which deed conveyed "under and subject to, however,...(2) outstanding coal, oil and gas minerals and mining rights if any." The Trial Court awarded 28% of $125,000.00 verdict to the United States.

The present position of the United States in interpreting the present language of the declaration of taking is inconsistent with past conduct. Presently they argue the complete mineral estate of Ross and David Oil, or 8/8ths has been severed as a separate estate; therefore, said estate is in David Oil, subject to a royalty in Ross, and not included in the present condemnation by acquiring the surface interest. The 1/8th interest, however, is an interest in land which runs with the land as part of the real estate. The government contends the wording of the condemnation does not include any of the subsurface rights owned by the Ross Heirs. Their previous conduct on the same surface by deed from the Ross Heirs belies their present position.

The situation regarding L. M. Lilly Estate and David Oil Company's past conduct with the government was brought to the attention of the Secretary of Agriculture through the United States Attorney as a result of the evidentiary hearings to determine, among other things, if the Secretary of Agriculture would clarify the words "fee simple title", "owners thereof", "third parties" "not outstanding of record in third parties" and "outstanding of record in third parties." The District Trial Court took evidentiary testimony from subsurface owners of their roadways on the surface, number of oil wells on the surface, conduct of oil operations on the surface and so forth, all of which were relayed to the Secretary and the Secretary refused to alter, amend or clarify the declaration of taking.

The Third Circuit, in their opinion, indicate that if the conditions affix to the mineral estate they can go

to the Court of Claims. There is no evidence of attempt to take a larger estate, they say. The land condemned is located in a recreation area, open to the public, adjoining a large, beautiful dam. Sightseeing, hiking, horseback riding, snowmobiling, camping and so forth are advertised; the area is open to the public. All activities on the surface are incompatible with such recreational pursuits. Oil operations are dangerous and risky and require extreme control and safeguarding, particularly in a recreational area. Cost of fencing or safeguards can be prohibitive. Recreation by the public on the surface is not compatible with the drilling operations. Previous acquisitions of like properties were undertaken around the periphery of the entire dam area and were taken in fee simple. Portions of said subsurface lands taken in fee simple were from L. M. Lilly. Where the declaration lends insight to the uses of the property acquired, the total effect of the language shows an attempt to "take" property without compensation. The Circuit Court, under facts as here at hand, should not reverse a District Court unless there is a clear abuse of discretion.

In condemnation proceedings under 40 USCS 258(a) rarely will a reviewing court be justified in substituting its own judgment, derived from cold record, for inferences to be drawn by Trial Court in the light of evidence in the case, expert testimony offered, configuration of land, as shown by evidence, or by view of premises, as to uses to which it is adopted. *United States vs. Hayes*, 172 F.2d 677 (CA 9, Or. 1949).

The Circuit Court has in fact done what it indicates the Judiciary cannot do, that is, enlarge the declaration of taking.

REASON NO. 5

Where the Secretary of Agriculture imposes conditions, rules and regulations on a remaining interest by a declaration of taking, statements of the United States Attorney that the Forest Service will not enforce the Rules and Regulations, made immediately before trial of the action, should not be the basis for an Appellate Court to reverse the District Court.

The Circuit Court in their opinion state as follows:

> "In any event, assuming arguendo some substance to the defendants' charge of 'bad faith', the record shows that the Government offered at interrogatories to clarify the declaration of taking but that offer was declined by the defendants." (Appendix 9a)

This is just not true. The government's offer consisted of oral statements made by the U.S. Attorney before trial in chambers to the effect that, although the Secretary of Agriculture would not amend the declaration of taking or clarify the language, they would agree that the rules and regulations of the Secretary do not pertain to the subsurface owners, L. M. Lilly, David Oil and the Ross Heirs.

> "The Courts are well agreed that an unaccepted promise, promissory statement or stipulation or declaration of future intention by condemnors as to what will be done or not done with respect to the property condemned, to that left untaken and to the rights of the landowners in relation thereto, cannot affect either the character or extend to the condemnors rights acquired or the amount of the damage and what is paid as just compensation. A condemnor cannot avail of what may aptly be termed a 'conditional condem-

nation' but must take whatever rights are sought to be appropriated absolutely, paying in full therefor, regardless of future intentions:" ALR 2d 366

The effect of the conditions on the fair market value on the date of taking, which was the main issue, was again ignored.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH J. MALIZIA
Counsel for Petitioners
25 E. 4th Street
P. O. Box 111
Emporium, Pa. 15834

June 30, 1980

APPENDIX A

OPINION OF THE THIRD CIRCUIT COURT OF APPEALS

(UNREPORTED)

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 79-2122

UNITED STATES OF AMERICA,
Appellant

v.

3,218.9 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF WARREN, STATE OF PENNSYLVANIA AND TEXASGULF, INC., ET AL.

Appeal From the United States District Court for the Western District of Pennsylvania

D.C. Civil No. 74-0103 Erie

Argued February 20, 1980

Before: SEITZ, *Chief Judge*, ROSENN, *Circuit Judge*, and SHAPIRO, *District Judge**

(Opinion Filed April 23, 1980)

* * *

OPINION OF THE COURT

ROSENN, *Circuit Judge.*

This appeal asks us to determine whether a Government condemnation of a surface tract of land constituted a taking of the subsurface mineral estates so as to entitle the subsurface owners to monetary compensation. The trial court submitted the issue to a jury which awarded damages to the subsurface owners. We conclude it was error to allow the jury to determine the damages to the subsurface estates under the terms of the declaration of taking and reverse that portion of the district court's judgment.

I.

The United States acquired certain lands for the Allegheny National Forest in Warren County, Pennsylvania by condemnation. The federal interest in acquiring the land as stated in the declaration of taking is to promote and protect the navigation of streams, production of timber, and development and management of adequate outdoor recreation resources in connection with the Allegheny Reservoir Project. The land which is the subject of this dispute was not held in fee by any one owner. In addition to the surface landowners, there were several owners of subsurface

---

*Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

mineral interests, most importantly oil and gas. Some of the subsurface mineral owners also had interests in the surface. Included among the subsurface owners are the defendants in this case.[1] There is no issue as to the Government's statutory authority to take the land; the question is whether the taking of the surface, reserving a right of access for mining the subsurface limited by government regulations, constitutes a taking of the subsurface mineral interests and therefore entitles owners of such interests to compensation.

The Government's declaration of taking and its complaint exempt from the condemnation any interest in coal, oil, gas or other minerals which are held by parties who have no other connected interest in the land other than a record title to coal, oil, gas, or other minerals. Individuals with any interest in coal, gas, or other minerals who also owned any additional interest in the fee were left with their mineral interests, subject, however, to the constraint that their right to enter upon the land to mine conform to the rules and regulations of the Secretary of Agriculture governing mining in the National Forest. The crucial portion of the declaration of taking provides:

---

[1]The dispute in this case involves 479.30 acres of land known as Tract 961. The Ross Heirs own the entire surface of Tract 961 and the complete oil and gas rights to 5.42 acres. The Government admits liability for the surface of Tract 961 and the attached 5.42 acre mineral interest. The David Oil Company owns seven-eighths and Ross Heirs one-eighth of the oil and gas rights on 419.11 acres while the Estate of L. M. Lilly owns the complete oil and gas rights on 54.77 acres. David Oil, the estate of Lilly and the Ross Heirs all claim Compensation for their mineral interests.

> *Tract 961:* The estate to be taken is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines; the reservation in the owners thereof, their successors or assigns of all coal, oil, gas and other minerals not outstanding of record in third parties together with the right to enter upon the land and prospect for, mine, and remove the same in accordance with the rules and regulations of the Secretary of Agriculture dated April 30, 1963, a copy of which is attached hereto as Schedule C; and the exception of all coal, oil, gas, and minerals outstanding of record in third parties.

The effect of the declaration of taking is to exempt from the condemnation all record title to subsurface minerals.

The known owners of any interests in the fee surface were duly served with notice of condemnation, including those with both mineral and surface interests. The record owners who held only mineral interests were not served.[2] However, the owners of only the mineral interests appeared and asserted that they were entitled to compensation because the taking of the surface estate and the imposition of the Secretary's mining rules on surface owners amounted in effect to a taking of their subsurface oil and gas interests.

---

[2]The L. M. Lilly Estate, the David Oil Company, and the Sheaffer Estate were not served with the declaration of taking on Tract 961. However, upon learning of the condemnation proceedings, they promptly entered an appearance claiming a right to compensation for their interests in Tract 961.

The United States filed a motion entitled: "Plaintiff's Motion for Determination By the Court of the Estate Taken and To Dismiss Certain Defendants as Unnecessarily Joined." The Government claimed the interests of the mineral owners were exempt from the taking by the specific terms of the declaration. The district court concluded that the language of the declaration of taking was unclear and conducted a hearing as to the effect of the Secretary's rules on the subsurface interests. After the hearing, the court stated that subsurface rights were affected and submitted the issue of damages to the jury. By special verdict, the jury awarded $321,355 for the surface lands[3] and $485,812 as compensation for the taking of the subsurface interests. The Government, in these condemnation proceedings, appeals the award for the subsurface interests on the ground that the question of damages should not have been presented to the jury because there was not a taking of the subsurface estates.

II.

Pennsylvania law recognizes that there may be three separate estates in land: the surface, the right of support, and the subsurface mineral rights. *Pennsylvania Bank and Trust Co., Youngsville Branch v. Dickey*, 335 A.2d 483, 485 (Pa. Super. 1975); *Smith v. Glen Alden Coal Co.*, 32 A.2d 227 (Pa. 1943). There may be situations where interests in a piece of land may be severed and owned by different persons. In *Duquesne Natural Gas Co. v. Fefolt*, 198 A.2d 608,

---

[3]The jury awarded the Ross Heirs $315,920 for their surface interest in Tract 961 and $5,435 for their attached oil and gas interests on 5.42 acres.

610 (Pa. Super. 1964), the Superior Court, quoting from the lower court, stated:

> The right of property in natural gas and oil ordinarily belongs to the owner of the land. The oil and gas are a part of the land so long as they are on it or in it or are subject to control therein. In other words, they are part of the land while they are in place. *They can be severed from ownership of the surface by grant or exception as separate corporeal rights.* Accordingly, they may be the subject of a sale, separate and apart from the surface and from any minerals beneath it; they belong to the owner in fee, or his grantee, as long as they remain part of his property, although use of them is not possible until they are severed from the freehold exactly as done in the case of all other minerals beneath the surface. Hence, a freehold of inheritance may be created in oil and gas.

(Emphasis added; citation omitted.)

In this case the interests of the mineral holders had been severed from the surface fee *prior* to the plaintiff's declaration of taking.[4] As to these properties, the declaration sought only to condemn the surface estate, with the reservation to the owners of the right to mine, subject however to the imposition of the Secretary of Agriculture's rules on future drilling on the surface estate. The parties holding only subsurface

---

[4]At oral argument the Government indicated that the fee simple had been severed into surface and subsurface interests in the 1930's or earlier.

estates retained the same conditions and rights after the taking as they possessed previously.

The district court apparently found the imposition of the Secretary's Rules on the use of the surface to be a sufficient taking of the third party subsurface estate to require compensation. We believe this analysis is faulty for two reasons. First, the terms of the declaration of taking specifically provide for "the exception of all coal, oil, gas, and minerals outstanding of record in third parties." The district court characterized this language as ambiguous. The defendants in this case do not suggest any reading of this language which casts doubt on its meaning. The language excepting the minerals is clear that third party mineral rights are not intended to be affected by the declaration. In view of this explicit limitation of the nature of the estate to be taken, the district court was without power to enlarge the terms of the taking. *United States v. 64.88 Acres in Allegheny County, Pennsylvania*, 244 F.2d 534, 536 (3d Cir. 1957).

Second, the possibility that in the future the Secretary's Rules may inhibit the defendants in the removal of the minerals does not provide a current basis for damages. The district court apparently believed that there was a taking of the subsurface estate because the Secretary's regulations of the surface use would greatly diminish the value of the drilling rights. We have held, however, that a possible future taking of property does not give rise to a present cause of action for damages.

In *64.88 Acres in Allegheny County, supra*, the United States Department of the Air Force acquired a clearance easement of private land adjoining an air-

port. The easement allowed the Government to control all obstructions, natural or artificial, including the natural earth forming hilltops, so as to leave an unobstructed, spatial, trapezoidal plane across and over the condemnee's land. The condemnee argued that the Government may be taking, or as a result of its taking, will claim a right to fly aircraft over his land. This court held:

> It is well established that, absent bad faith which is not argued here, the government's determination and explicit assertion of the nature and extent of the estate to be taken are not judicially reviewable. If any subsequent low flying of aircraft over appellee's land should occur and should be said to invade property rights, the acquisition of the right to keep that space clear will not have conferred any attendant right to fly through it. As another court has aptly said in a similar situation:
>
> "***since the Government has not acquired a right to fly aircraft over the condemnees' land by these proceedings, it follows that, if the Government does cause its aircraft to make flights over the lands of these defendants, or has already done so, at such elevation and with such frequency as to result in taking beyond that described in the Declaration of Taking on file in these cases, or in actual physical damages, the *landowners would have a right to bring suit against the Government for damages or just compensation.*"

Id. at 536. (Citations omitted.) Thus, the cause of action for potential consequential damages to the subsurface estate accrues, not at the time of the taking of the

surface, but if and when the damage occurs to the subsurface estate.

The defendants attempt to obtain judicial review of this condemnation award by claiming that the Secretary of Agriculture exercised "bad faith." The "bad faith" allegedly is evidenced because the Secretary declined to clarify the language in the declaration of taking. However, the "bad faith" discussed in *64.88 Acres in Allegheny County* does not refer to the failure to clarify the declaration. Rather, we believe "bad faith" in this context is an attempt to secure a greater property interest than that specified in the declaration of taking, without just compensation. In this case, the Government has unequivocally expressed its intention not to take the oil, gas, and other mineral interests and it has no reason for seeking them. The purpose in taking the surface lands pertains to their use for timber land and not for mining. In any event, assuming *arguendo* some substance to the defendants' charge of "bad faith," the record shows that the Government offered at interrogatories to clarify the declaration of taking but that offer was declined by the defendants.

It appears that the remedy for the defendants is to bring suit in the Court of Claims if in fact the Government attempts to so restrict the use of their estates as to cause them damages or, if it amounts to a taking, bring suit in the appropriate court. The rationale for this limitation is that under sovereign immunity the Government can only be sued by consent and to allow the district court to enlarge the scope of the condemnation award would be to abrogate sovereign immunity. In *United States v. 3,317.39*

Acres of Land, More or Less, in Jefferson County Arkansas, 443 F.2d 104, 106 (8th Cir. 1971), the court said:

> The United States, as sovereign, is immune from suit, except when it consents to be sued, and the terms of its consent to be sued in any court defines that court's jurisdiction to entertain the suit. The terms of the Government's consent to be sued in the facts of the instant case are defined by the Tucker Act, 28 U.S.C. §1491.
>
> The landowner is entitled to recover damages for the actual taking of property which is not included in the declaration of taking, but the award may not be made in a condemnation suit under the theory of damages to the remainder. This must be done in a separate proceeding under the Tucker Act in the Court of Claims, (28 U.S.C. 1491), [or in the district court if less than $10,000 is involved, 28 U.S.C. §1346(a)(2)].

(Citations omitted.) *See also United States v. 21.54 Acres in Marshall County, W. Va.*, 491 F.2d 301, 304 (4th Cir. 1973).

III.

We conclude that it was error for the district court to permit the jury to consider damages to the subsurface estates. The case will be remanded to the district court with instructions to vacate the $485,912 award in favor of the owners of the subsurface estates.

Costs taxed against the defendant-appellees.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX B

MEMORANDUM AND ORDER ON MOTION FOR NEW TRIAL

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DENYING MOTION FOR NEW TRIAL

Dated June 21, 1979

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action 74-103 Erie

Tract 961

Allegheny National Forest Project

UNITED STATES OF AMERICA,

Plaintiff

v.

3,218.9 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF WARREN, STATE OF PENNSYLVANIA AND TEXASGULF, INC., ET AL.,

Defendants

MEMORANDUM AND ORDER ON MOTION FOR NEW TRIAL

I. *Brief Discussion and History*

The Declaration of Taking and the Complaint in Condemnation were filed on December 5, 1974. Under 40 U.S.C.A. §258a:

> "...title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America,...."

But the statute requires that the Declaration of Taking shall contain:

> "(3) A statement of the estate or interest in said lands taken for said public use." *Inter alia.*

In this case, by the Declaration and the Complaint, the Government has taken three separate tracts of land. We are concerned in this litigation with Tract 961 in the Allegheny National Forest Project. This tract comprises 479.30 acres, and in the Declaration the estimated just compensation is stated to be $191,700.00.

The statement of the estates and interests taken for public use as described in the Declaration and in the Complaint is as follows:

> "Tract 961: The estate to be taken is the fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines; the reservation in the owners thereof, their successors or assigns of

all coal, oil, gas, and other minerals not outstanding of record in third parties, together with the right to enter upon the land and prospect for, mine, and remove the same in accordance with the rules and regulations of the Secretary of Agriculture dated April 30, 1963, a copy of which is attached hereto as Schedule C; and the exception of all coal, oil, gas, and minerals outstanding of record in third parties."

Some eleven persons and estates were named as purported owners in the Declaration, and the same persons were named in the complaint as having or claiming an interest in the property in addition to the various municipalities, which had an interest by reason of tax assessments. Upon the service of the Declaration and the Complaint, it soon developed that other persons or estates claimed various interests in portions of the 479 acre tract. In particular, what became known as the Ross heirs, the David Oil Company, and the Estate of L. M. Lilly, claimed interest in the subsurface oil and gas and mineral rights, which the Government contended were not embraced within the taking. But the owners of the subsurface oil and gas on the other hand contended that the imposition of rules and regulations of the Secretary of Agriculture diminished if not prevented their removal of oil and gas under the methods used in the oil and gas business today.

Strange as it may seem, the Government claims that the language in the taking is clear, precise, and correctly defines the interests taken by the Government and is in accord with the Statute and the Rules of Civil Procedure. But, nevertheless, Government

counsel on August 5, 1977, filed a motion styled: "Plaintiff's Motion For Determination By the Court Of The Estate Taken And To Dismiss Certain Defendants As Unnecessarily Joined". Attached to the motion were numerous copies of deeds to persons, who were claiming interests in the subsurface rights. The motion especially related to the Estate of L. M. Lilly, David Oil Company, and Ada S. Scheaffer, who had filed appearances in the case and were claiming interests in the subsurface of a portion of 479 acres. A hearing was held on the said motion on April 13, 1977, and a Pretrial Order was entered on April 15, 1977. For simplification and clarity, my Pretrial Order as mentioned is attached hereto. (Appendix A). Particular notice is taken to the contention of each of the parties as mentioned in the Government's Exhibit A and Landowners' Exhibit B annexed to my Order.

A hearing was held on the pending motions on November 8, 1977. A further pretrial conference was held on November 14, 1977, and an evidentiary hearing was held on November 15, 1977. At these hearings testimony was taken as to the effect of the rules and regulations of the Secretary of Agriculture imposed on the oil and gas subsurface in the Declaration of Taking in which certain reservations of oil and gas are mentioned. Finally, on April 27, 1978, a final Pretrial Order was entered. In that order, this court held in part:

> "The Government's prior motion for determination by the Court of the estate taken and to dismiss certain defendants as unnecessarily joined is denied. The reason for the evidentiary hearing on November 15, 1977, was to make a determina-

> tion, if appropriate, that no subsurface rights were affected by the Taking. It seems self evident to this Court that the very motion praying for a determination by the Court of the estate taken indicates the uncertainty in the language."

A copy hereto is annexed as Appendix B.

The case finally came on for trial, and the jury reached a verdict on June 23, 1978. A copy hereto is annexed as Appendix C.

On reception of the jury verdict, it was apparent immediately to me as the Trial Judge that the jury fully understood the issues left to it for decision. The Special Verdict awarded compensation in the aggregate sum of $807,167.00. It apportioned the award among four interests: a, b, c, and d. Judgment was entered thereafter on the verdict. The Government then filed a motion for a new trial.

II. *Discussion on Motion for New Trial*

Government counsel filed a timely motion for a new trial. The motion is in twenty numbered paragraphs. When discussing the complaint and the various motions in this civil action, the Federal Rules of Civil Procedure apply. For instance, it is noticed in the rules relating to condemnation cases commencing with Rule 71A(c)(2) *Contents,* requires that "The complaint shall contain a short and plain statement ... the interests to be acquired...."

With respect to the motion for new trial, Rule 61 is to be applied in this case. Harmless Error has application to the issues raised in the motion for a new trial. But more importantly, nowhere in the motion

for a new trial does the Government contend that the verdict rendered by the jury is anywise excessive, nor does it allege that the errors mentioned in the twenty-paragraph motion, if any, lead to a miscarriage of justice or that the verdict is otherwise illegal. I regard the twenty-page motion for a new trial as not in accordance with the requirements of Rule 7(b)(1), entitled: *Motions and Other Papers*, which states in part: "... motion which ... shall state with particularity the grounds therefor, and shall set forth the relief or order sought." This requirement is also mentioned and discussed in 2A Moore's Federal Practice ¶7.05, at page 1541, and the cases cited therein together with decisions on the subject. I regard the averments and the motion for a new trial as merely raising harmless error at most, which, if occurred, did not effect the outcome of the trial. It is my considered judgment that the language in the Declaration and in the complaint, which requires hearings and a court determination as to the interests taken is not in compliance with the statute nor with the rules and pleadings required under Rule 71A. But, nevertheless, it is also my considered judgment that justice has been done both to the Government and to the owners of the interests taken in these 479 acres by the jury award in this case. But it is now necessary after the foregoing review to examine the latest document filed by the Government. On January 12, 1979, this Court entered an Order directing briefs to be filed in response to the Government's motion for a new trial. This Order was entered in lieu of oral argument, which had been set on the motion for a new trial and was unable to be held because counsel were engaged elsewhere. I indicated in that Order that there was some doubt in

my mind, as the Trial Judge, that the motion was sufficient and adequate under the rules. It was pointed out that the motion made no charge that the errors anywise affected the amount of the jury verdict. Apparently, pursuant to that Order, Government counsel filed a brief on March 27, 1979, but in the meantime on March 23, 1979, Government counsel filed what he styled: "Amendment To Motion For New Trial". This, of course, is out of time, as a new trial motion cannot be amended at this late date, eight months after the Judgment. Nevertheless, in the said motion, Paragraphs 2, 5, 7, 8, 14, 17, 18, and 19 were entirely deleted and withdrawn from the original new-trial motion. And as to Paragraph 6 in the original motion, Government counsel withdrew a statement attributed to the Court which misquoted the Court. But it is noticed in the final paragraph that Government counsel after the Judgment desires to amend the motion for a new trial by requesting the Court to vacate the awards mentioned in Paragraphs c. and d. of the Special Verdict; and on failure of the Court to vacate the awards in c. and d., then a new trial is requested.

In this Court's view, the final paragraph of the Amendment To Motion For New Trial is out of order at this late date. It certainly would have been proper in the original, but nowhere in that motion was the Court requested to set aside the jury verdict or any part thereof, or the judgment entered thereon. However, the Court regards the Amendment To Motion For New Trial as simply an abandonment of the nine reasons withdrawn from the original motion.

The result of all of the foregoing is that the Government's sole contention in this case is that by the

language in the Declaration no subsurface rights were affected anywise. It compares the language in the Declaration in the instant case with the language in the state case, *Com., Pennsylvania Game Commission v. Benek*, 378 A.2d 497 (1977), in which the Declaration read: "the surface only". Government counsel says:

> "In the instant case, unlike Benek, supra, the Secretary has utilized terms of legal art which truly leave no room for doubt that the fee simple acquired was qualified by the reservation and exception of the oil and gas estates including their appurtenant rights. It is respectfully submitted that if there is ambiguity to be found in an estate taken, it lies with the language of the Declaration in Benek, rather than in the case here."

In this case, one does not use artful language to conclude that the Declaration certainly took the surface of 479 acres. Assuming that subsurface was reserved, the Declaration imposed rules and regulations upon the owners of the subsurface. The owners of the oil and gas, upon the Declaration being filed, were confronted by the surface being owned by the Government to promote and protect the navigation of streams, and the production of timber thereon, and for the development and management of adequate outdoor recreation resources in connection with the Allegheny Reservior Project, and for all other authorized purposes.

One purpose of the hearing on November 15, 1977, was to clarify the effect of the Secretary's rules and regulations upon any oil and gas operation by the owners of the mineral interests. This was a sharp trial issue also. The jury was left with instructions that it

could consider a diminution or effect of the rules and regulations of the Secretary upon any attempt to remove oil and gas by the owners thereof.

The Government equates the language of the Declaration in the instant case with that in the *Benek* case, that is, that the interests taken were simply surface only. It says it has left the subsurface rights uneffected. But in connection with leases and conveyances in which subsurface owners acquire oil and gas rights as indicated in Appendix A, such a taking would destroy:

> "the right of way over and across said premises for the purpose of drilling and operating for and producing petroleum, oil and gas from said premises in the usual and customary manner."

A right of way is certainly a real property, which can be condemned or wiped out. A surface-only taking in this case would require just compensation to the oil and gas operators for destruction of such a right of way.

The witness, John F. Potter, a practicing attorney experienced in Government and land condemnation cases, reviewed the Secretary's regulations, item by item, on a large screen. He pointed out to the jury the implications of the regulations on the oil and gas interests, as contended in the seven numbered paragraphs attached to the Declaration of Taking. He concluded on the Record at page 260:

> "Q. Now, Mr. Potter, as a practicing attorney, requested to certify a title for the subsur-

face of Tract 961, would you certify a marketable title for Tract 961?

"A. No, sir, I would not.

"Q. Why would you not?

"A. Because I don't believe, under the circumstances, you could ever go in there and satisfactorily drill for oil, or gas, or mine for minerals, because you just don't know what conditions imposed upon you by the Forest Service are going to be."

It is clearly evident to this Court that considering the facts that counsel stipulated and agreed to the Special Verdict Form and bearing in mind that counsel for the Government submitted four proposed instructions to the jury, relating to the issue now under discussion, that the jury followed the instructions, understood the issues, and returned a verdict in a dollar amount in response to the proposed instructions, and in accordance with the stipulated Special Verdict Form.

The motion for a new trial must be and is denied.

However, this Court notices the second sentence in Rule 59(d), which forbids this Court from granting a motion for a new trial for a reason not stated in the original motion. Had that original motion averred that the verdict under c. and d. was excessive, this Court could have given consideration to a reduction or in lieu of acceptance of reduction, a new trial could be ordered. But at this late date no reduction in the verdict can be given by this Court, but in this connection, the verdict as given was on the generous side. But, nevertheless, I repeat that justice has been done

to these parties in the trial of this case, and the verdict is supported by substantial evidence.

ORDER DENYING MOTION FOR NEW TRIAL

AND NOW, June 21, 1979, for the reasons stated in the foregoing Memorandum, the motion of the Government to grant a new trial with respect to the just compensation award by the jury on Tract 961, is denied.

IT IS SO ORDERED.

(s) Joseph P. Willson
JOSEPH P. WILLSON,
Senior District Judge

APPENDIX "A"

IN THE UNITED STATES District Court
For the Western District of Pennsylvania

C. A. No. 74-103 Erie
Tract 961

UNITED STATES OF AMERICA

v.

3,218.9 Acres of Land, etc.

PRETRIAL ORDER

Counsel have been heard at an argument on the government's motion filed November 14, 1976, in which the government seeks a determination by this Court of the estates taken in the Declaration of Taking, it being the contention of the government that certain of the defendants having an interest in the subsurface are unnecessarily joined in this case.

In accordance with discussion with counsel at the hearing, it is the view of this Court that the owners of the subsurface interests are entitled to have the issue of just compensation determined in the trial of this case in order that the jury might fix the amount of compensation due the surface owners and the owners of the subsurface oil, gas and mineral rights.

Counsel will file pretrial briefs outlining four trial issues to be submitted to the jury and jury instructions to be submitted with each, that is to say:

1) jury is to find just compensation for the taking of the surface and any fractional interest the surface owner has in the subsurface.

2) the issue of just compensation to any fee owner of the subsurface including a loss of oil and gas operating rights on the surface.

3) damages to the leasee of oil and gas interests by reason of the language in the Declaration of Taking and the purpose for the taking, and

4) evidence as to the effect of the taking upon language in conveyances reading in part as follows:

"the right of way over and across said premises for the purpose of drilling and operating for and producing petroleum, oil and gas from said premises in the usual and customary manner."

From earlier briefs it appears that the government and the landowners' contentions are summarized in excerpts from briefs, which are: Exhibit A for the government and Exhibit B for the landowners.

It is the Court's view that the government's title acquired in the Declaration imposes the Forestry Department's rules and regulations on the oil and gas operators. These operators are claiming damages.

It is also the Court's view that these issues can be decided by submission of special verdicts to the jury, fixing just compensation for:

a) surface owner

b) fee oil and gas owner

c) owner of leasehold on oil and gas.

It is suggested that briefs be filed within 30 days and thereafter a final pretrial conference will be held.

IT IS SO ORDERED this 15th day of April 1977.

(s) Joseph P. Willson
JOSEPH P. WILLSON,
Senior District Judge

GOVERNMENT'S EXHIBIT A

It is clear from the language of the Declaration of Taking that the Government desires to acquire a qualified fee simple title to Tract 961 which excludes all coal, oil, gas and other minerals. Minerals which are owned by the owner of the base fee are reserved in said owner, but subject to the Rules and Regulations of the Secretary of Agriculture. These Rules and Regulations are directed toward and regulate or restrict the process of extracting minerals. (A true and correct copy of said Rules and Regulations is attached hereto as Exhibit "A"). However, as to minerals outstanding of record in third parties, it is evident that the Government seeks neither to acquire any interest in the same nor to impose any restrictions thereon.

It is the Government's position that the exemption from the taking of "all coal, oil, gas, and minerals outstanding of record in third parties" encompasses the interests of Mr. L. M. Lilly, David Oil Company and Mrs. Ada S. Sheaffer. The Government also submits that, where the mineral interest outstanding of record in a third party is a working interest and is exempt from the restrictions on extraction of the mineral imposed by the Rules and Regulations, then, necessarily the owner of the base fee, as a royalty owner, is also exempt from the Rules and Regulations.

LANDOWNERS' EXHIBIT B

Tract 961 contains 479.3 acres, the surface of which is owned by Julia C. Ross Estate. The subsurface of the 479.3 acres encompasses 55 acres of mineral lands, owned in fee by the L. M. Lilly Estate. The remaining 424.3 acres of mineral lands are owned ⅛ thereof by the Julia Ross Estate and the David Oil Company owns the working interest under said 424.3 acres, subject to a 3/64 royalty interest in Ida S. Sheaffer, individually and as Executrix of the Estate of Clyde M. Sheaffer. The express language of the Declaration of Taking excludes all coal, oil, gas and other minerals outstanding of record in third parties. The Government therefore argues that none of the subsurface owners have any interest in Tract 961.

The first and foremost argument of the subsurface owners are that, "*the development and management of adequate outdoor resources*" on the surface of this land, which is the purpose of the taking, would so utilize surface over these mineral lands so as to make said mineral lands valueless.

It is much like the case of United States vs. 339.77 acres of land, 420 F.2d 324, in which the Court said:

> "The taking *reserved the mineral rights* to the coal in landowner *but subordinated* such ownership *to the right of the United States to flood.* Evidence shows that the taking, for all practical purposes, *destroyed* the landowners' use of the

rights reserved. As the trial Court instructed, the landowner was entitled to the fair market value of the land as it was enhanced by the mineral rights actually deprived as well as by the improvements thereon."

B. *Notwithstanding the use of the surface by the United States Forestry, as defined in the Declaration of Taking, the imposition of conditions on the subsurface constitutes a destruction of the market value of said subsurface and a taking within the meaning of the Constitution.*

Attached to and made part of the Declaration of Taking are set forth the very conditions under which the subsurface owners may operate.

The very title is as follows:

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 74-103 Erie
Tract 961

UNITED STATES OF AMERICA

v.

3,218.9 ACRES OF LAND, etc.

ORDER ON MOTIONS AND FOR PRETRIAL

The trial on the issue of just compensation to the owners of property condemned by the Government in the Declaration of Taking at this civil action number, Tract 961, has been considerably delayed because of the uncertainty of the meaning of the language in the Declaration of Taking. For instance, on August 5, 1975, the Government filed a motion for determination by the Court of the estate taken and to dismiss certain defendants as unnecessarily joined. This motion is in 13 numbered paragraphs, and as the Court understands it the Government's position is that under the Taking no oil and gas rights whatsoever have been impaired, and the persons mentioned in the Taking as having a possible interest are to be dismissed with respect to any claimed compensation. This motion and the possible ruling of the Court has been under considerable discussion at various times by counsel and has been the subject of status and pretial hearings. After briefing and argument, a Pretrial Order was entered. This indicated the contention of the Government and of the landowners on Exhibits A and B to the Order. But when the case came on for trial last November, testimony was taken from the landowners' witnesses with respect to possible damage to the subsurface by the Government's condemnation and Taking of the surface in view of the restrictions placed thereon by the Secretary of Agriculture and by restrictions due to the proximity of the property to the Allegheny Reservoir. As will appear in the transcript of that hearing, a suggestion was made that the

United States Attorney secure from the Government a clarification of the language of the Taking. Counsel for the landowners has said that:

> "The first and foremost argument of the subsurface owners are that, '*the development and management of adequate outdoor resources*' on the surface of this land, which is the purpose of the taking, would so utilize surface over these mineral lands so as to make said mineral lands valueless."

The Government has now informed the Court that there will be no clarification of the language in the Declaration of Taking of Tract 961. Under these circumstances, my Pretrial Order entered April 15, 1977, stands.

The issues involved in this case will be submitted to the jury in accordance with that Pretrial Order.

The Government's prior motion for determination by the Court of the estate taken and to dismiss certain defendants as unnecessarily joined is denied. The reason for the evidentiary hearing on November 15, 1977, was to make a determination, if appropriate, that no subsurface rights were affected by the Taking. It seems self evident to this Court that the very motion praying for a determination by the Court of the estate taken indicates the uncertainty in the language.

The Government's prior motions for a pretrial ruling that the subsurface owners were not affected by the Taking and for reconsideration are denied.

Counsel will appear at the Court's chambers at Erie on Monday, May 22, 1978, at 2:00 P.M., for a pretrial conference and agreement as to the trial date.

IT IS SO ORDERED THIS *27th* day of *April 1978.*

(s) Joseph P. Willson
JOSEPH P. WILLSON,
Senior District Judge

APPENDIX C

JUDGMENT OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Office of the Clerk
UNITED STATES COURT OF APPEALS
For the Third Circuit
21400 United States Courthouse
Independence Mall West
601 Market Street
Philadelphia 19106

Thomas F. Quinn
Clerk

Telephone
215-597-2995

May 15, 1980

Mr. Gilbert W. Conley
Clerk, U.S. District Court
227 U.S. Courthouse
Erie, Pa. 16501

Re: United States of America, Appellant vs. 3,218.9 Acres of Land, etc., et al.
No. 79-2122
(D.C. Civil No. 74-0103 Erie)

Dear Sir:

Enclosed is a certified copy of the judgment in the above-entitled case(s), together with copy of the opinion. The certified judgment is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

We return herewith the record and exhibits and will appreciate your signing the enclosed list as a receipt for same.

Counsel are advised of the issuance of the mandate by copy of this letter. A copy of the certified judgment is also enclosed, showing costs taxed, if any.

Very truly yours,
(s) Thomas F. Quinn
Clerk

lmp
Enclosure
cc: (Carl Strass, Esq.
(James W. Moorman, Esq.
(Dirk D. Snel, Esq.
Joseph J. Malizia, Esq.

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 79-2122

UNITED STATES OF AMERICA,
Appellant

vs.

3,218.9 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF WARREN, STATE OF PENNSYLVANIA AND TEXASGULF, INC., et al.

(D. C. Civil No. 74-0103 Erie)

On Appeal From the United States District Court for the Western District of Pennsylvania

Present: SEITZ, *Chief Judge*, ROSENN, *Circuit Judge* and SHAPIRO, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel on February 20, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered July 10, 1978, be, and the same is hereby reversed as to that portion of the said judgment which awarded $485,912 in favor of the owners of the subsurface estates, and the cause is remanded to the said district court with instructions to vacate the said award, all in accordance with the opinion of this Court. Costs taxed against defendant-appellees.

ATTEST:
(s) Thomas F. Quinn
Clerk

April 23, 1980

*Honorable Norma L. Shapiro, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Certified as a true copy and issued in lieu of a formal mandate on May 15, 1980.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX D

DECLARATION OF TAKING FILED 12/5/74 AND ATTACHED SCHEDULES

"B" PROPERTY PLOT

"C" CONDITIONS, RULES, REGULATIONS

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DECLARATION OF TAKING

Civil Action No. 74-103 Erie

(Filed 12/5/74)

UNITED STATES OF AMERICA, PLAINTIFF

v.

3,218.9 ACRES OF LAND, MORE OR LESS, SITUATED IN THE COUNTY OF WARREN, STATE OF PENNSYLVANIA AND TEXASGULF INC., ET AL., DEFENDANTS

To the Honorable, the United States District Court:

I, Robert W. Long, Assistant Secretary of Agriculture of the United States, do hereby declare that:

1. (a) The land hereinafter described is taken under and in accordance with the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a), and acts supplementary thereto and amendatory thereof, and under the further authority of the Act of Congress approved March 1, 1911 (36 Stat. 961), as amended by Section 6 of the Act of June 7, 1924 (43 Stat. 653), which Act authorizes the acquisition of land to promote and protect the navigation of streams, and the production of timber thereon; the Land and Water Conservation Fund Act of 1965 (78 Stat. 897 at p. 903); and the Act of Congress approved August 31, 1974 (88 Stat. 803), which Act appropriated funds for such purposes.

(b) The public uses for which said land is taken are as follows: The said land is necessary to promote and protect the navigation of streams, and the production of timber thereon, and for the development and management of adequate outdoor recreation resources in connection with the Allegheny Reservoir Project, and for all other authorized purposes.

The land has been selected by me for acquisition by the United States for use in connection with the Allegheny National Forest, and for such other uses as may be authorized by Congress or by Executive Order.

2. A general description of the land being taken is set forth in Schedule A attached hereto and made a part hereof, and is a description of the same land described in the complaint in the above-entitled cause.

3. The estates to be taken for said public use are as follows:

Tracts 5j and 932: The fee simple title, subject, however, to existing easements for public roads and highways, public utilities, railroads, and pipelines.

Tract 961: The estate to be taken is the fee simple title, subject, however, to existing easements for public roads and highway, public utilities, railroads, and pipelines; the reservation in the owners thereof, their successors or assigns of all coal, oil, gas, and other minerals not outstanding of record in third parties, together with the right to enter upon the land and prospect for, mine, and remove the same in accordance with the rules and regulations of the Secretary of Agriculture dated April 30, 1963, a copy of which is attached hereto as Schedule C; and the exception of all coal, oil, gas, and minerals outstanding of record in third parties.

4. A plat showing the land taken is annexed hereto as Schedule B and made a part hereof.

5. The sum estimated by me as just compensation for said land is $1,120,200.00, which sum I cause to be deposited herewith into the registry of said court for the use and benefit of the persons entitled thereto. I am of the opinion that the ultimate award for said land probably will be within any limits prescribed by law on the price to be paid therefor.

In witness whereof, the United States of America, by its Assistant Secretary of Agriculture, thereunto authorized, has caused this declaration to be signed in its name by said Robert W. Long, Assistant Secretary

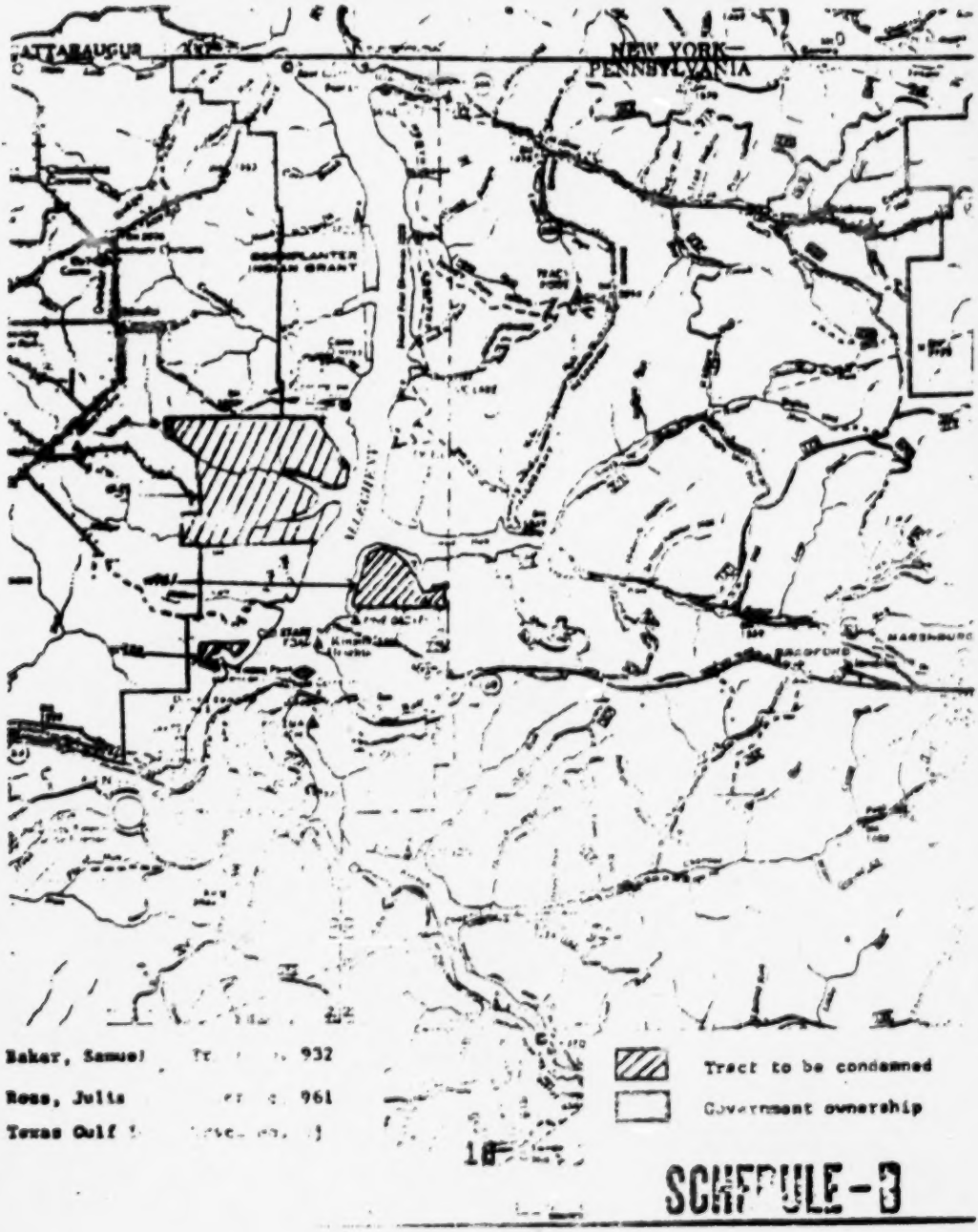
of Agriculture, this 22nd day of October A.D. 1974, in the City of Washington, District of Columbia.

(s)Robert W. Long
Robert W. Long
Assistant Secretary
for Conservation, Research
and Education

38

ALLEGHENY RESERVOIR
ALLEGHENY NATIONAL FOREST

38



SCHEDULE-B

SCHEDULE C

UNITED STATES DEPARTMENT OF AGRICULTURE FOREST SERVICE

CONDITIONS, RULES AND REGULATIONS TO GOVERN EXERCISE OF MINERAL RIGHTS RESERVED IN CONVEYANCES TO THE UNITED STATES

Code of Federal Regulations – Title 36 – Chapter II – Section 251.15

(a) Except as otherwise provided in paragraphs (b) and (c) of this section, in conveyances of lands to the United States under authorized programs of the Forest Service, where owners reserve the right to enter upon the conveyed lands and to prospect for, mine and remove minerals, oil, gas, or other inorganic substances, said reservations shall be subject to the following conditions, rules and regulations which shall be expressed in and made a part of the deed of conveyance to the United States and such reservations shall be exercised thereunder and in obedience thereto:

(1) Whoever undertakes to exercise the reserved rights shall give prior written notice to the Forest Service and shall submit satisfactory evidence of authority to exercise such rights. Only so much of the surface of the land shall be occupied, used, or disturbed as is necessary in bona fide prospecting for, drilling, mining (including the milling or concentration of ores), and

removal of the reserved minerals, oil, gas, or other inorganic substances.

(2)(i) None of the lands in which minerals are reserved shall be so used, occupied, or disturbed as to preclude their full use for authorized programs of the Forest Service until the record owner of the reserved rights, or the successors, assigns, or lessees thereof, shall have applied for and received a permit authorizing such use, occupancy, or disturbance of those specifically described parts of the lands as may reasonably be necessary to exercise of the reserved rights.

(ii) Said permit shall be issued upon agreement as to conditions necessary to protect the interest of the United States including such conditions deemed necessary to provide for the safety of the public and other users of the land, and upon initial payment of the annual fee, which shall be at the rate of $2 per acre or fraction of acre included in the permit.

(iii) The permit shall also provide that the record owner of the reserved right or the successors, assigns, or lessees thereof, will repair or replace any improvements damaged or destroyed by the mining operations and restore the land to a condition safe and reasonably serviceable for authorized programs of the Forest Service, and shall provide for a bond in sufficient amount as determined necessary by the Forest Service to guarantee such repair, replacement or restoration.

(iv) Failure to comply with the terms and conditions of the aforesaid permit shall be cause for ter-

mination of all rights to use, occupy, or disturb the surface of the lands covered thereby, but in event of such termination a new permit shall be issued upon application when the causes for termination of the preceding permit have been satisfactorily remedied and the United States reimbursed for any resultant damage to it.

(3) All structures, other improvements, and materials shall be removed from the lands within one year after date of termination of the aforementioned permit. Should the holder of the permit fail to do so within the specified time, the Forest Service may remove, destroy or otherwise dispose of said structures, other improvements, and materials at the permittee's expense, or in lieu thereof, may upon written notice to the permittee, assume title thereto in the name of the United States.

(4) Timber and/or young growth cut or destroyed in connection with exercise of the reserved right shall be paid for at rates determined by the Forest Service to be fair and equitable for comparable timber and/or young growth in the locality. All slash resulting from cutting or destruction of timber or young growth shall be disposed of as required by the Forest Service.

(5) In the prospecting for, mining, and removal of reserved minerals, oil, gas, or other inorganic substances all reasonable provisions shall be made for the disposal of tailings, dumpage, and other deleterious materials or substances in such manner as to prevent obstruction, pollution, or deterioration of water resources.

(6) Nothing herein contained shall be construed to exempt operators or the mining operations from any requirements of applicable State laws nor from compliance with or conformity to any requirements of any law which later may be enacted and which otherwise would be applicable.

(7) While any activities and/or operations incident to the exercise of the reserved rights are in progress, the operators, contractors, subcontractors, and any employees thereof shall use due diligence in the prevention and suppression of fires, and shall comply with all rules and regulations applicable to the land.

(b) The conditions, rules and regulations set forth in subparagraphs (1) through (7) of paragraph (a) of this section shall not apply to reservations contained in conveyances of lands to the United States under the Act of March 3, 1925, as amended (43 Stat. 1133, 64 Stat. 82; 16 U.S.C. 555).

(c) In cases where a State, or an agency, or a political subdivision thereof, reserves minerals, oil, gas, or other inorganic substances, in the conveyance of land to the United States under authorized programs of the Forest Service and there are provisions in the laws of such State or in conditions, rules and regulations promulgated by such State, agency or political subdivision thereof, which the Chief, Forest Service, determines are adequate to protect the interest of the United States in the event of the exercise of such reservation, the Chief, Forest Service, is hereby authorized, in his discretion, to subject the exercise of the reservation to such statutory provisions or such conditions, rules and regulations in lieu of the conditions, rules

and regulations set forth in subparagraphs (1) through (7) of paragraph (a) of this section. In that event, such statutory provisions or such conditions, rules and regulations shall be expressed in and made a part of the deed of conveyance to the United States and the reservation shall be exercised thereunder and in obedience thereto.

All regulations heretofore issued by the Secretary of Agriculture to govern the exercise of mineral rights reserved in conveyances of lands to the United States under authorized programs of the Forest Service shall continue to be effective in the cases to which they are applicable, but are hereby superseded as to mineral rights hereafter reserved in conveyances under such programs.

(30 Stat. 35, as amended, 16 U.S.C. 551. Interprets or applies 36 Stat. 961, as amended, 16 U.S.C. 513-519, 42 Stat. 465, as amended, 16 U.S.C. 485, 486, and 50 Stat. 525, as amended, 7 U.S.C. 1011)

Signed at Washington, D.C., on April 30, 1963.

(s) ORVILLE L. FREEMAN,
Secretary.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-103 Erie
Tract 961

United States of America,

Plaintiff,

vs.

3,218.9 Acres of Land, More or Less, Situated in the County of Warren, State of Pennsylvania, and Texasgulf, Inc., et al.,

Defendants.

TRANSCRIPT

The above-entitled matter came on for hearing before THE HONORABLE JOSEPH P. WILLSON, Senior District Judge, on Monday, November 14, 1977, at 2:00 p.m., in chambers, United States Post Office and Courthouse, State Street, Erie, Pennsylvania.

* * *

[6] THE COURT: I don't know. What bothers me is that description in the Declaration of Taking

embraces all the property. Doesn't it take in everything? That description takes in the 471 acres, doesn't it? You don't mention any operator, even Lilly, which you now say is not within your taking. But you don't mention him as a purported owner.

MR. STRAUSS: That's why we didn't believe they were included in the taking. That's why they weren't named. That's why Davis Oil Company was not named.

THE COURT: It seems inconceivable in view of the fact this property, as I see the plan, faces the water, is on the water, you don't mention any oil wells, gas wells or anything like that, any improvements on there at all and I can't quite conceive you have excepted and reserved out of that description all the properties you are talking about. I can't read it that way. I asked Judge Weber to look at it. He can't figure it out. When you say third party, who's the first party and who's the third party?

MR. STRAUSS: The first and second would be the condemnee and condemnor.

THE COURT: It doesn't say that.

MR. STRAUSS: That would be the interpretation the Government would give to it.

THE COURT: That's what I mean. It is really unclear.

* * *

APPENDIX F

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 74-102
Tract 961
Allegheny National Forest Project

United States of America,

Plaintiff,

vs.

3,218.9 Acres of Land, More or Less, Situated in the County of Warren, State of Pennsylvania, and Texasgulf, Inc., et al.

Defendant.

EVIDENTIARY HEARING

Tuesday, November 15, 1977

Transcript of proceedings in the above-captioned matter, held before The Honorable Joseph P. Willson, in the United States Courthouse, Courtroom B, Erie, Pennsylvania, commencing at 10:00 a.m., on the day and date above set forth.

* * *

[3] PROCEEDINGS

THE COURT: I see a few familiar faces here. I'm glad to have you all present. I regret to some considerable extent the fact that, I don't believe that we are in a position, the Court, and I hope the litigants agree, and I guess you do, to try the issue of just compensation and tract 961, the Ross tract, which was scheduled for trial, jury trial, here today. It seems to me there is some difficulties in the case that we are to resolve, so we know exactly what we are going to resolve. Now, without making too much of a speech, let me call attention to what the Court has in mind this morning. The statute under which the lands were condemned by the United States is found in 40 U.S.C. 258, Declaration of Taking. Said Declaration of Taking shall contain or have annexed thereto: 1) A statement of the authority under which the public, under which in the public use for which said lands are taken. Now, of course I guess there is no argument about that. No issue about that. 2) Is a description of the lands taken, sufficient for the identification thereof. Well, perhaps there is nothing about that but I'm not quite sure about that. The thing that concerns the Court is this. 3) A statement of estate or interest in said lands taken for said public [4] use. It seems to me there is a problem here. A statement of estate or interest in said lands taken for said public use. Now, 4) A plan showing the lands taken, and of course, 5) is a statement of some of the money estimated as just compensation by the authority taking the condemned property. Now, No. 3 again, going back, what interest was taken, and what was the estimate, and look at the Declaration of Taking. Now, that's filed in the Court,

1974. Of course, there is a number of tracts in that declaration. Tract 961, that's on the declaration. The estate to be taken is fee simple title. Well, that takes us back to kind of fundamentals, fee simple title. A fee simple absolute is an estate limited absolutely to a man, his heirs and assigns, whoever, without limitations or condition. These definitions are well known to everyone. What it means, a fee means is that a property that can be inherited. That's the old-time thing. You call it a fee if it was passed on from generation to generation. So, the fee part here is no problem ordinarily, and the fee simple signifies a pure fee, an absolute estate of inheritance, clear of any restrictions, particulars, heirs being the descendants of the heirs in general, whether male or female, the largest estate and most extensive interest that can be enjoyed in the land. So when you cut it down, you have to talk pretty [5] carefully, precisely. And the term fee or fee simple absolute are equivalent terms, so what we are talking about then is the total estate that can be had in the land. Then in this 961, after saying its a fee simple title, it isn't. Subject, however, to existing easing for public roads, public utilities, railroads and pipelines; the reservations and the owners thereof, their successors or assigns, of all coal, oil, gas and other minerals found outstanding in the record in third party, together with the right to enter upon the land and prospect for, mine, and remove the same from the land in accordance with the rules and regulations of the Secretary of Agriculture, dated April 30, 1963, a copy of which is attached hereto and scheduled "C"; and the exception of all coal, oil, gas and mineral rights outstanding on the record of the third party.

Well, that leaves the Court in a quandary as to whether or not 258 subdivision C is clear because we ought to be able to charge the jury and tell the jury exactly what the property taken is and how they go about the settlement of just compensation to the persons entitled thereto. So, then, for instance, if we look at those qualifications and that description there is a notice, for instance that the purported owners, the government is supposed to name the purported owners [6] and we've had pretrial discussions, motions and so on in this case and if the government wants a fee simple title excepting the reservements and so on, excepting the reserving of some oil and gas to somebody, apparently, it seems to me the people that have an outright grant to the oil and gas, have a fee simple title in the subsurface without question. I don't know who the third parties are, whether they are Lillys or whether they are Ross heirs or who they are. This is very vague. That's the reason why I wanted to have this hearing today and we take some evidence as to what the lands consist of, who owns what and with the hope that the Court can draft an Order directing the Secretary of Agriculture to, in this case, amend his Declaration so that a clear, precise statement of the estate or interest in the land taken for public use is set forth so we can then try the case based on that. That's the purpose the Court has in mind, so go ahead, give some evidence.

- - -

MR. MALIZIA: I call Mr. Morrison.

- - -

(Whereupon, the witness was sworn.)

\- - -

RICHARD MORRISON

* * *

[7] Q. Mr. Morrison, what relationship, if any, do you bear to any of the parties involved in the litigation known as tract 961?

A. Co-Executor with the L. M. Lilly estate.

* * *

Q. That particular section of 54 acres, is it a part of a larger tract formerly an L. M. Lilly estate?

A. It's part of a 200 acre tract.

* * *

[9] Q. What is the deed book and page?

A. Deed Book 208, Page 562.

* * *

Q. In that particular instrument which vested title in L. M. Lilly, in examining that instrument, are there any restrictions with regards to the use of the surface of the tract known as the Morrison tract?

A. No.

MR. MALIZIA: We offer into evidence, Your Honor, what's been marked as Defendant's Exhibit No. 1, which it is a contention of the L. M. Lilly estate, is our [10] source of title in and to the 54 acres located as part of tract 961 which we say is our total 8/8 title in and to the subsurface, which has no restrictions shown thereon as to the use of the subsurface, to get at any of the subsurface rights.

THE COURT: You mean the surface?

MR. MALIZIA: There is no restrictions on the surface.

* * *

[12] MR. STRAUSS: With respect to the deed, if I may comment, Your Honor, the government has no objection to the admission of the deed, but it does wish to qualify the --- Mr. Malizia has stated twice and so does Mr. Morrison that there is absolutely no requirements in that deed and I would submit that the deed itself will speak for itself and there is a provision in the deed that provides a right-of-way over premises for purposes of drilling and operating and producing in the usual and customary manner, and I submit that the statements that there are no limitations whatsoever would not be quite the case.

MR. MALIZIA: We agree, Your Honor, that there is [13] a sentence to that effect within this deed to L. M. Lilly. In fact, the precise language is part of the instrument, the instrument speaking for itself is together with, and I'm quoting, 'all of the oil wells, tanks, pumping power, drive pipe casing, pipelines and generally all the tools, machinery and equipment used in the production of oil and gas from said premises. Also, a right-of-way over and across said premises for the purpose of drilling and operating for and producing petroleum oil and gas from said premises in the usual and customary manner.'

* * *

Q. In terms of the phrase, usual and customary manner, and first asking you these questions, are you familiar with the drilling of the property for oil?

A. Yes, sir.

* * *

[14] Q. With reference to the phrase usual and customary manner, would you state what your understanding would be of usual and customary manner insofar as drilling on the surface of a property is concerned?

* * *

[15] THE WITNESS: Well, you just make your location, notify the landowner, cut your right-of-way in your location, usually the nearest and best way in to the location, and cut your right-of-way location for power and rod lines and that's it.

THE COURT: What about roads?

THE WITNESS: Well, your roads, your nearest way where there was a main road through and we always cut, it was customary to cut from that road the nearest way and the best way to do to the well location, the well site.

THE COURT: In other words, you had the right to make a road, didn't you?

[16] THE WITNESS: Oh, yes, that was granted in all the leases, the right to cross and pass over and to use any existing roads and to cut any roads needed for the drilling and the producing of oil.

* * *

[19] Q. So, all of the rest of what is around the piece that is involved in tract 961, the 54 acres, does L. M. Lilly own that fee any longer or does the government own it?

A. The government owns it.

Q. So, that 54 acres then of L. M. Lilly, does it have any ownership of L. M. Lilly surrounding it at all?

A. No.

* * *

[23] THE COURT: Are they taking off the 54 acres?

THE WITNESS: No, it hasn't been operated since the portion that had the power and equipment on it was condemned.

THE COURT: But those wells, the pipe in those wells, they are available?

THE WITNESS: Oh, yes, the wells are all in tact. The remaining wells that are there.

MR. MALIZIA: Your Honor, we have slides.

THE COURT: I know. I just want to get it on this record there is pipe in the wells.

THE WITNESS: The dry pipe tubing rods and pumping jocks (phonetically) are in the wells, the last time I was on the property.

THE COURT: I don't know, really, that's another point. I don't see anything like that reserved in either [24] paragraph of that, reservation, reserve gas and oil wells they talk about reserving oil and gas and so on, the coal and the Declaration of Taking takes everything if it's included in that description. Everything is gone from the owner being taken over by the government and certainly that includes the

pipes, pipeline and everything else, as well as the subsurface.

* * *

[39] BY MR. MALIZIA:

Q. So, then, in summary, there are how many wells on the 54.77 acres involved within tract 961 altogether?

A. Eleven wells.

Q. And the eleven wells were previous to the condemnation of tract 963, the previous trial, pumped and operated by how many powers?

A. Two powers.

Q. And, those two powers since '72 are owned by whom?

A. In 1972 they were owned by L. M. Lilly.

Q. And the government did what in '72, they condemned them?

A. They condemned and took the land and both powers.

[40] Q. So, from that date to the present time, how many wells on the 54.77 acres are there that have not been pumped or operated?

A. Eleven wells.

Q. Why haven't they been operated?

A. Because of no power to operate them.

* * *

[45] THE COURT: Let me ask Mr. Strauss now, will you [46] state now the position of the government

with respect to this 54-acre tract as to whether it is included in the language of the first several sentences and the last sentence in that Declaration?

MR. STRAUSS: Yes, Your Honor, our position is this, that that 54.11 acres would, or 54.77 acres would come within the exception of all coal, oil, gas and minerals outstanding of record in third parties. Wherefore, would be fully accepted from the taking. In the beginning,---.

THE COURT: How does that get to be a third party? In other words, the last three lines there?

MR. STRAUSS: I think I would say this way, Your Honor, the estate starts out and it says the estate to be taken is a fee simple title, and then it says subject to the reservations in the owners thereof, their successors or assigns, of all coal, oil, gas and other minerals not outstanding of record in third parties. Now that language, when it says ---.

THE COURT: Now, outstanding in the record, who does that apply to?

MR. STRAUSS: I think that would apply to the David Oil Company and to Mr. Lilly when it says the reservations in the owners thereof. I believe the word thereof modifies, is a modifier referring to the owners of the fee simple estate and refers back to that.

[47] THE COURT: What you're saying is, as I understand it, there is no leasehold condemned in this case? Is that right?

MR. STRAUSS: That would be correct, Your Honor.

THE COURT: No leasehold interest and that the Lilly 54 acres which is owned, oil and gas owned in fee is outstanding of record in the third party?

MR. STRAUSS: That is correct, Your Honor.

THE COURT: How did there get to be a third party?

MR. STRAUSS: I believe because the government conceives of the owner of the basic fee simple title to be the first party and the government to be the second party.

THE COURT: Everybody else must be a third party or maybe a fourth party?

MR. STRAUSS: Yes, Your Honor.

THE COURT: I don't understand that language. It seems to me then, the most, it seems to me if that's the case, see, we're going to determine the value to the Ross people of a service, aren't we, in 54 acres?

MR. MALIZIA: Yes, your Honor.

THE COURT: Wouldn't this be a severance damage, then to the lease that these people are entitled to if you take away the surface and destroy the operating rights by that reason?

[48] MR. STRAUSS: Well, our position is that the Declaration of Taking does not interfere with the subsurface and that's, if there is some claim by virtue of what the government physically attempts to do in the future ---.

THE COURT: I'm not talking about that. What have they done now? In all the condemnations over there, under the government's present theory over

there, it's going to leave this 54 acres isolated. The subsurface is isolated practically to the shore of the lake?

MR. STRAUSS: But Your Honor, I claim that the taking goes further than the Declaration. It is one that has to be brought in under the Tucker Act.

THE COURT: Now listen, what you are talking about, the surface there, haven't you taken the wells? You don't reserve any wells? Have you taken those wells? They are not reserved?

* * *

[49] ROY SCOTT

having been previously sworn, was examined and testified as follows:

Direct Examination

BY MR. MALIZIA:

Q. Mr. Scott, what is your occupation?

* * *

Q. With reference to the property known as the David Oil Company, are you familiar with that property?

A. Yes, sir, I am.

* * *

Q. The David Oil Company, does it own any part of tract 961 in any way? What is their ownership?

A. We have the mineral rights, 7/8 mineral rights.

Q. I show you what has been marked as Defendant's [50] Exhibit No. 4, and ask you if these exhibits attached hereto are documents of title into the David Oil Company?

* * *

THE WITNESS: Yes, that's the chain of ownership on the David Oil Company.

* * *

Q. As a rule of these documents as shown in Defendant's Exhibit No. 4, how many acres involved in tract 961 does the David Oil Company have any interest in; do you know?

A. It should be 419 plus a fraction.

* * *

[51] A. Well, the ⅛ royalty on that belongs to the Ross heirs.

Q. And are the Ross heirs also the owners of the surface which is condemned by the United States?

A. Yes, they are.

* * *

[53] Q. Approximately when were the last wells drilled on tract 961, on the portion consisting of 419.11 acres?

A. 1966, '65--'65, '66.

* * *

[57] Q. Going back to the utilization of the surface and before the condemnation of tract 961, before this present condemnation, would you tell me

please what restrictions, if any, that you know of to the use of the surface were there in David Oil as a result of your documents of title on Landowners' Exhibit No. 4?

A. Well, the landowners, of course to understand that property has timber on it, and the landowners had the write up that we weren't allowed to go in and discriminately cut down trees. We were supposed to use a little judgment in the use of the land. We could use what timber was necessary [58] to develop and operate the lease, and if we were going to move a rig, if we were permitted to clear, we were permitted to clear the location, cut a right-of-way; the only stipulation in it that I can think of was if we were going to do any large clearing, cutting, we were to notify the owners, give them five days' notice that we were going to start cutting.

* * *

Q. Can you possibly operate and explore and carry [59] out a drilling program on tract 961 for David Oil without taking up the surface of the land?

A. No, I'm going to have to use the surface of that land. I'm going to have to use it.

Q. And some of the uses to which you would put the land, just briefly for the record, would be what?

A. Well, I'm going to have to build a well on it, I'm going to have to set a jack on it. I'm going to have to put rod lines on it, lead lines, gas lines.

Q. In terms of fracking (phonetically) a well, what would be some of the things you would do to the surface?

A. Well, to frack the well, you would need at least twice the location that you would need if you weren't going to frack it, so you are going to have to cut up a lot more territory to begin with.

Q. Would you have to dig pits on the surface?

A. In that particular area, I would say yes. It's not necessary if you got tankers, but getting tankage in this day and age is almost impossible, so we was digging pits, lining them with plastic and using them for our water supply.

Q. All right. Speaking about water supply, with reference to drilling a well and these pits, is there, on this property, a source of water that runs across the property and on the surface?

A. There are springs on that property, yes.

[60] Q. Is there a stream known as Broadville Run?

A. Yes, on the lower right-hand side of it, yes.

Q. For a drilling party to operate for the subsurface and drill for oil, must he have water?

A. Definitely, definitely, it is a matter of life and death, water.

Q. And is water there on the surface for your use?

A. The water was there for our use, that is right.

Q. Any restrictions to its use?

A. None that I know of, none whatsoever.

Q. Any restrictions in the documents of title imposed by the landowners in the David Oil Company?

A. Not that I know of, there wasn't.

Q. After the wells were all completed and they are in there, is it necessary for David Oil to continue to use the surface to get his oil out and produce it?

A. Yes, because to begin with you are setting up on the surface and that's a long-term project that you're talking about. You're not talking about something you're going to finish overnight or in a week or a month. So, you are going to be continously using the surface of that property.

* * *

[61] THE COURT: * * * What's the government's position now on this leasehold? Does that come up under this condemnation?

[62] MR. STRAUSS: Your Honor, the position is that the leasehold of the David Oil Company is an outstanding interest in oil and gas in a third party and it comes under the exception stated to the taking in the language of the declaration.

THE COURT: Well, that's the trouble, which one? There is two of them in there.

* * *

[78] MR MALIZIA: And the second thing for which I would be sworn in connection with this would be evidence with regards, a title attorney examining a title in terms of selling property for David Oil and Julia Ross to a prospective buyer who would want to buy the subsurface. The only thing I would put on the

record there, I think the Court would probably take judicial notice [79] of it is the title attorney will examine the title before he will certify to a prospective buyer who wants to drill, he will examine the title and in examining the title with the Declaration of Taking, when it was filed, that becomes part of the title with the rules and regulations and that no attorney could certify this title to a prospective purchaser from Julia Ross and David Oil and certify that they could drill that area free and clear of the rules and regulations of the United States Courts. That would be the second point.

THE COURT: Well, that's an argument.

MR. MALIZIA: Well, I thought it was more than that. It's a fact.

THE COURT: You have as an advocate, it is an argument and I think it is properly on the record, but, if the court accepts it, but you won't have to be sworn to make that statement.

MR. MALIZIA: Then, Your Honor, the third of things I have is this. This morning, the United States Attorney said that the landowners exhibit 3 was not in my possession at the time of the planning of the Lilly trial. He further said that everything that I had requested to be done as shown on this map at the Lilly trial to get this piece of the Ross cut out and put in the Lilly trial, I didn't even have this at that time. Well, [80] Your Honor, I have four letters here addressed to my clients, one dated May 17, all of them dated May 17, 1972. The Lilly trial was in '74. In one of the letters, all of the letters say the same thing, the enclosed map, meaning this document, along with of-

fers for settlement in the case of Lilly for 54.77 acres. They were offering $10,955 for this piece and in that letter in May of 1972, we have taken the liberty of forwarding a copy of this letter with a map enclosure to your attorney, Mr. Malizia. Now, I had this map in my possession at the time of the Lilly trial and at that time, the time of the arguments with Don Strauss, United States Attorney and I tried to get this piece out of the Julia Ross case and in that trial and Don Strauss, Attorney, opposed it.

Also, a letter of George M. Ross, dated May 17, 1972 where they designate what they're taking, surface, the subsurface and also the letter to David Oil where they're taking the 419.11 acres plus, in addition, advising them that they are going back and taking this orange area which is an additional 112 acres and offering them $59,820; and a subsequent letter to me under date May 20, 1973, where they say they have updated the appraisal and the offer to the David Oil and now are willing to offer $74,445. All of which dates lead up to and before the actual condemnation of tract 961 [81] leading all my people and all the actual time, and again, it is in furtherance of the language and position of Lilly and everybody else at the time of the Lilly trial, leading everybody to believe they were going to take it in fee, pursuant to the authority of the commission of 1971, and offers made pursuant thereto. So, I would like to offer all of these things into evidence, Your Honor. I believe they are very appropriate. I believe they tend to show how the United States Forestry proceeded over a long period of time, advising everybody they were going to condemn it; they had the authority to condemn it as

of September 16, 1971, made offers to these people, and I respectfully submit, Your Honor, although I have no proof on this, as a result of the verdict in the Lilly case when that verdict come in, I believe they decided to change the language of the rules and regulations and pose the rules and regulations and not take it in fee. I further charge with reference to that. I submit that with the rules and regulations imposed upon the surface, they felt that in due course without paying for the oil, they have what they really want on the surface, and that's what they really wanted on it. So, it adds up to an attempt at condemnation, in effect, killing the subsurface without any just compensation to the subsurface owners who would be Ross [82] heirs, David Oil and Lilly.

THE COURT: All right. Have those marked and they will be put in evidence.

* * *

[83] THE COURT: Well, what area is this here, the white area?

MR. MALIZIA: Well, that would be the distance from the taking line of 13 or the high water line, 1365 to the actual take line where they did take the surface and that's the surface line around there. So, from 1365 to the surface, the government has acquired and condemned the surface all around.

* * *

[89] THE COURT: As I understand it, the government says now it isn't taking any of the subsurface except the title in the Ross heirs; is that it?

MR. MALIZIA: Yes, Your Honor.

MR. STRAUSS: We are not taking the Ross heirs interest, we are only taking the Ross heirs surface and that's all. It has been reserved in the Ross heirs, their interest in minerals which is the actual ownership of that.

[90] THE COURT: What is the reason for putting the regulations in then?

MR. STRAUSS: The regulations only apply to 5.42 acres of land.

THE COURT: Why don't they say that? I can't read it that way. What you are saying now isn't in that Declaration, is it?

MR. STRAUSS: I don't think the Declaration ordinarily would be so specific, but if it makes it clearer to the Court what the government is trying to do, they I'm sure an attempt will be made ---.

* * *

[94] THE COURT: What is that paragraph 4 of your last motion on this? There is some doubt in the government's mind as to what they, there was taken and anyway, there is in my mind and I think if you file now, if you will within the next 20 days, what you think now has been established here and look at that section on taking, 258-A40, 2 and 3, description of the land taken for identification thereof and 3, a statement of the state in said land taken for said public use and see if you can resolve it. My present inclination is that it can be corrected, the declaration can be corrected to define exactly what is taken. Then, when we get that established with finality, then

we can go to jury on just compensation. Anything more? We'll recess.

* * *

[95] MR STRAUSS: Your Honor, may I ask one question. You don't wish us to go to the Department of Agriculture with respect to correcting the estate at this time, do you?

THE COURT: There is no harm in it but I couldn't order you to do that now. I think that ought to be a good thing if you will tell them the problem. Why don't you? It seems to me that you might order a copy of this record and send it down there and tell them what the problem of the court is and maybe they'll correct it without further adieu.

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 74-103 Erie
Tract 961

United States of America,

Plaintiff

vs.

3,218.9 acres of land, more or less, situated in the County of Warren, State of Pennsylvania, and the Estate of Julia Ross, et al.,

Defendant

PRE-TRIAL CONFERENCE

Transcript of proceedings in the above-captioned matter, held before The Honorable Joseph P. Willson in the Federal Courthouse, Erie, Pennsylvnaia, commencing at 2:00 p.m., Monday, May 22, 1978.

Appearances:

Joel B. Strauss, Esq., AUSA, appearing on behalf of the Plaintiff.

Joseph J. Malizia, Esq., 2nd Floor, Creighton Building, 25 E. 4th Street, P. O. Box 111, Emporium PA 15834, appearing on behalf of the Defendant.

* * *

[3] THE COURT: I don't see any way of getting away from this thing, except trying it the way we talked about it before and the way we have got to do it now. It seems to me that it's in the nature of the surface damages and in the nature of when you apply the rules of the Secretary of Agriculture, which can be changed at any time, that these owners are entitled to have their just compensation fixed, based on what the testimony shows the probabilities are as to what will happen and so on. I guess we've got to go ahead with it. I was in hopes the Government would define it a little bit more clearly as to what exactly—when you talk about a fee simple title, that's the greatest title there is. It seems to me that when you lock these fellows in and [4] say "We don't want your oil and gas, but you can't do much with it except if the Secretary says so," and all that sort of thing. As I understood from the testimony that we had last winter, some of these mineral interests have rights in the surface of cutting timber and crossing and all that sort of thing; laying pipe line; various rights in the timber and all that sort of thing.

So, it's all intermingled. The difficulty is to pinpoint the testimony with the fair market value of each interest that's taken. Primarily, that's the difficulty of counsel, see? That's the way we'll have to do it. I don't think the Government's been fair with these people in that respect, because I think—it looks to me like they've—in other words, in times past they felt a

grieve with the verdicts and this is why they want to keep away from the mineral verdicts.

MR. STRAUSS: Well, Your Honor, there's never been any indication as to what the motivation of the department ---

THE COURT: I know that, but I'm just saying that the inference to me is that this is artfully drawn. You can't read that and find out what's been taken. You've got to search the records and you might have to go back 100 years to find out what's been reserved, don't you know that?

[5] MR. STRAUSS: Well, I think we do have the operative deeds.

THE COURT: Well, you say that you think so. How can a landowner know, or anybody else? It ought to be a matter of record so that anybody can look at it and say, "Here's what they've taken." You can't do it here. But, that's neither here nor there. That's the only way I know how to try it.

* * *

[23] MR. STRAUSS: That is not the Government's position. That's why, I think, the No. 2 Interrogatory really could be deleted, because our testimony will indicate that there is a difference in value in the minerals before and after condemnation.

* * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

C. A. No. 74-103 Erie
Tract 961

United States of America,

Plaintiff,

vs.

3,218.9 acres of land, more or less, situated in the County of Warren, State of Pennsylvania, and the Estate of Julia Ross, et al.,

Defendant.

JURY TRIAL

Monday, June 19, 1978

Transcript of proceedings in the above-captioned matter, held before The Honorable Joseph P. Willson, Senior District Judge, in Courtroom B, United States Courthouse, Erie, Pennsylvania, commencing at 12:30 p.m., on the day and date above set forth.

Appearances:

On behalf of the Government: Joel B. Strauss, Esq., AUSA.

On behalf of the Defendant: Joseph J. Malizia, Esq.

* * *

[17] MR. STRAUSS: The only thing that I would expect from you, Mr. Malizia, is this: In our conceding to you the complete ⅛th on it, I wouldn't expect you to [18] be trying to introduce any evidence in the case with respect to prior assertions by the Government to claim a portion of that royalty on the 419 acres.

THE COURT: I think that's fair. In other words, we take it as it is. That's all right, if you're agreed on it. In other words, "C" could read, "David Oil Company, ⅞ths and the Ross heirs, ⅛th ownership of oil and gas rights on 419.11 acres." Is that right?

MR. STRAUSS: Yes, Your Honor.

* * *

[22] THE COURT: Yes, sure it is.

This will be the verdict sheet that I'll send out, is that it?

MR. STRAUSS: That's fine with me, Your Honor.

* * *

[32] MR. MALIZIA: Yes. Your Honor, I have the rules and regulations of the Forestry in the taking on slides cast up on the screen. I felt that the jury wasn't going to comprehend the way the Declaration of Taking is filed with that fine print, unless they really had it in front of them with a witness explaining it. So, I had the rules and regulations broken down; pictures of each section taken and cast up on the slides and I in-

tended to go through, if the Court permitted, each one of the rules and regulations and show how it changed the surface from an individual ownership to the public ownership for the dam purposes and how the rules and regulations effect the subsurface. I was going to do that in that manner.

THE COURT: What do you think about that, Joel?

MR. STRAUSS: Well, I think, on the screen, they would have the statistics, pretty much of an attorney's representation to the jury in a closing argument, as to what his understanding of the law was, in order to [33] present the ---

THE COURT: That's in the language?

MR. STRAUSS: I think.

THE COURT: You're talking about the language of the taking and the language of the rules and regulations?

MR. MALIZIA: Yes, Your Honor.

THE COURT: I think that's for the jury to determine that. Put the two together. That's the whole point of it. I think that's the way to do it. We'll go on that basis. The jury will decide everything. We've got the taking—read the taking and have that in evidence, if everybody wants to put that in evidence. That's it. You can tell the jury what it is and Joel can say what he thinks the effect is and the Government can say what the effects are—what it means and the landowner can do the same thing and the jury can come up with an answer.

I'll see you at 9:30 in the morning.

* * *